Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

DARWIN NEIBAUR and JUNE NEIBAUR, HUSBAND AND WIFE, and DARWIN NEIBAUR FARMS, a Partnership,

Petitioners,

v.

EDWARD G. ELLIOTT and MARY L. ELLIOTT,

Respondents.

On Petition For Writ Of Certiorari To The Idaho Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Idaho Supreme Court erred in holding that a Bankruptcy Court 11 U.S.C. § 349 dismissal, without prejudice, of a Chapter 12 bankruptcy petition was, in effect, intended by Congress to be res judicata/collateral estoppel/issue preclusion/claim preclusion as to related issues later presented in a state court case where the parties included the Chapter 12 debtors and a third party who was not a party in the bankruptcy proceedings.

PARTIES TO PROCEEDINGS BELOW

Petitioners

Darwin P. Neibaur and June Neibaur, husband and wife, and Darwin Neibaur Farms, an Idaho general partnership with its principal place of business in Idaho

Respondents

Edward G. Elliott and Mary L. Elliott, husband and wife

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PETITION FOR A WRIT OF CERTIORARI

Appellants Darwin Neibaur and June Neibaur, husband and wife, by and through their attorney, Brent T. Robinson of the firm Ling, Robinson & Walker; and Darwin Neibaur Farms, an Idaho general partnership, by and through its attorney, Paul L. Westberg of the firm Westberg, McCabe & Collins, respectfully pray that the United States Supreme Court grant a writ of certiorari to review the opinion of the Idaho Supreme Court.

OPINIONS AND ORDERS BELOW

The Opinion of the Idaho Supreme Court (App., *infra*, 1-29), the Order Denying Petitions for Rehearing (App., *infra*, 43-44), and the Opinion and Order Re Motion for Summary Judgment of the trial court (App., *infra*, 30-39).

JURISDICTION

The Opinion of the Supreme Court of the State of Idaho was entered on April 8, 2003 (App., *infra*, 1-29). The Supreme Court of Idaho denied a timely Petition for Rehearing on May 29, 2003 (App., *infra* 45-46). The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT FEDERAL LAW

Section 349 of the Bankruptcy Code provides as follows:

11 U.S.C. § 349. Effect of dismissal

(a) Unless the court, for cause, orders otherwise, the dismissal of a case under this title [11 U.S.C.S. §§ 101 et seq.] does not bar the discharge, in a later case under this title [11 U.S.C.S. §§ 101 et seq.], of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title [11 U.S.C.S. §§ 101 et seq.] prejudice the debtor with regard to the filing of a subsequent petition under this title [11 U.S.C. §§ 101 et seq.], except as provided in section 109(g) of this title.

(b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title –

(1) reinstates –

(A) any proceeding or custodianship superseded under section 543 of this title [11 U.S.C.S. § 543];

(B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and

(C) any lien voided under section 506(d) of this title;

(2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and

(3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

Under an additional federal law, reference is made to *House Judiciary Report*, which provides, in pertinent part, as follows:

> Subsection (a) specifies that unless the court for cause orders otherwise, the dismissal of a case is without prejudice . . .
>
> Subsection (b) . . . The basic purpose of the subsection is to undo the bankruptcy case, as far as practicable, and to restore all property rights to the position in which they were found at the commencement of the case . . .

INTRODUCTION

This petition presents to the Court the opportunity to determine what effect 11 U.S.C. § 349 has on proceedings in Bankruptcy Court that are dismissed, and then the state court uses those proceedings to make its determination finding that *res judicata* and collateral estoppel apply. If the Opinion of the Idaho Supreme Court is allowed to stand as will be explained hereafter, it will have a far-reaching affect on the effect that bankruptcy proceedings have on other subsequent court proceedings.

STATEMENT OF THE CASE

On January 27, 1995 Darwin Neibaur and June Neibaur filed a Chapter 12 bankruptcy petition in the United States Bankruptcy Court for the District of Idaho. An adversary proceeding was commenced in Bankruptcy Court by Plaintiffs-Respondents, Edward Elliott and Mary Elliott [hereinafter "Elliotts"], against Defendants-Appellants,

Darwin Neibaur and June Neibaur [hereinafter "Neibaurs"], regarding Elliotts' ability to seek recovery in both actions; namely, a land obligation and a business note. Darwin Neibaur Farms, an Idaho general partnership [hereinafter "the partnership"], was not a party to the adversary proceeding. On August 7, 1996, before the adversary action was decided, the Neibaurs' bankruptcy petitions were dismissed.

On October 28, 1997, Elliotts filed a motion for partial summary judgment in state court based upon the claim that the Bankruptcy Court's dismissal of Neibaurs' bankruptcy petition constituted a final judgment on the matters before the court, and the effect of collateral estoppel. The state court subsequently issued a decision and finding that *res judicata* and collateral estoppel did apply, and entered a partial summary judgment against Neibaurs and the partnership. These issues as well as other issues were timely appealed to the Idaho Supreme Court, and the Supreme Court of Idaho ultimately affirmed the lower court's decision with respect to the issues.

On or about April 29, 2003, Neibaurs and the partnership timely filed Petitions for Rehearing with the Idaho Supreme Court, which petitions were denied on May 29, 2003.

REASONS FOR GRANTING THE PETITION

This Petition must be granted in order to provide guidance to state courts as to the effect 11 U.S.C. § 349 dismissal shall have and not have with respect to related state court proceedings. The Idaho decision clearly opens the floodgates for state courts to merely rely upon what

transpired in bankruptcy court actions even though the Chapter 12 case was dismissed without prejudice. The ruling of the Idaho Supreme Court will be relied upon not only in the state of Idaho, but it is anticipated that it also will be relied upon in other states, thus creating power and jurisdiction in bankruptcy court that was not intended by Congress.

THE DECISION BELOW IS CONTRARY TO THE PROVISIONS OF 11 U.S.C. § 349 OF THE BANKRUPTCY CODE AND SUPPORTING LAW PERTAINING THERETO.

The difficulty that the Idaho Supreme Court decision creates is that there has been no explanation of or reference to 11 U.S.C. § 349 so as to resolve the discrepancies between this section and use of the doctrines of *res judicata* and collateral estoppel by the state court.

Bankruptcy by its nature is unique and determinations made in bankruptcy court, although decisions on merits, may never be intended to have a binding result. The purpose in a Chapter 11, 12 or 13 bankruptcy is to obtain a confirmed plan for reorganization, and the proceedings, in essence, all lead up to that objective which, depending on the chapter, is the final outcome. If a confirmed plan is not accomplished, then all of the bankruptcy proceedings up to that point are for naught, so to speak, and the case is either dismissed or converted. Dismissal of bankruptcy proceedings puts the parties back in the position where they were at the time the bankruptcy case was initiated.

Prior to the trial in the state court action, the Neibaurs filed Chapter 12 bankruptcies. The purpose for filing

bankruptcy was to determine whether they could obtain a confirmed Chapter 12 Plan for reorganization – not litigate the Elliott case. However, the bankruptcy court ultimately dismissed the Neibaurs' Chapter 12 bankruptcies *without cause* based on a determination that the amount of the debt owed by Neibaurs exceeded the Chapter 12 debt limit of $1.5 million, and the court believed reorganization could not be successful. See Order dismissing case (App., *infra*, 40). The bankruptcy court also dismissed the Elliotts' adversary action. See Order attached hereto (App., *infra*, 41-42).

Following dismissal of the Chapter 12 bankruptcies without prejudice, the present case resumed in state court. Based on the earlier findings and the bankruptcy court's decision, the district judge prevented the Neibaurs from asserting key contract defenses under the doctrines of *res judicata* and collateral estoppel, and entered a partial summary judgment in favor of Elliotts (App., *infra*, 30-39), which constituted one of the issues on appeal to the Idaho Supreme Court. It is the Neibaurs' position that the application of *res judicata* and/or collateral estoppel based on preliminary decisions of a bankruptcy court that ultimately dismissed the bankruptcy case without prejudice is improper.

Under 11 U.S.C. § 349 of the Bankruptcy Code, a dismissal such as the one ordered in regard to the Neibaurs' petitions is a dismissal without prejudice. One of the most well-respected treatises pertaining to this issue is *Collier on Bankruptcy* which explains: "The effect of the dismissal of a case under Title 11 is set forth in § 349 of the Code. In general, the dismissal of a case prior to discharge is without prejudice . . . " *Collier on Bankruptcy*, § 349.01, ¶ 1. See also *House Judiciary Report*.

Where an action or proceeding is dismissed without prejudice, rulings preceding the final judgment of dismissal are, as a general rule, not operative as *res judicata*, and the parties are left as free to litigate the questions involved in the rulings as though the action had not been commenced. *Matteson v. United States & Canada Land Co.*, 127 N.W. 629 (Minn., 1910), adhered to 127 N.W. 997 (Minn., 1910); *Sheffield Co. v. R. Hoe & Co.*, 23 P.2d 876 (Wash., 1933). A judgment of dismissal without prejudice is not regarded as being 'on the merits' so as to preclude the maintenance of a subsequent action. *Lamb v. Cramer*, 285 U.S. 217 (1932); *Snyder's Case*, 152 A. 33 (Pa., 1930). Hence, a dismissal without prejudice makes it unnecessary for the court in which the subsequent action is brought to determine whether the subsequent action is predicated on the same cause as the original action or whether the identical parties are involved. *Southern P.R. Co. v. United States*, 133 Fed. 651 (CA9 1904), aff'd, 200 U.S. 341 (1906); *O'Keefe v. Irvington Real-Estate Co.*, 39 A. 428 (M.D., 1898); *Prondzinski v. Garbutt*, 86 N.W. 969 (N.D., 1901).

In *De Ville Photography, Inc. v. Bowers*, 159 N.E.2d 443 (Ohio, 1959), an Ohio state court held that a disallowance by a 'referee' in bankruptcy of a claim based on a judgment for sales taxes due the State of Ohio is not *res judicata* as to that same claim following a dismissal without prejudice of the bankruptcy action itself.

Furthermore, it is a well-established principle that the basic purpose of 11 U.S.C. § 349 dealing with the effects of dismissing a bankruptcy case is to *undo* the case, as far as practicable, and to restore all property rights to the position in which they were found as of the commencement of the bankruptcy case. *In re Kent Funding*

Corp., 290 B.R. 471 (Bankr.E.D.N.Y., 2003). Dismissal of a bankruptcy case enables creditors and debtors to get on with their non-bankruptcy business and resolve their disputes in the appropriate fora. *In re Aheong*, 276 B.R. 233 (9thCir.BAP 2002). Dismissal of a bankruptcy case operates, to the extent possible, to *reverse* what has transpired during a bankruptcy proceeding. *In re TNT Farms*, 226 B.R. 436 (Bankr.D.Idaho, 1998). **Dismissal of a bankruptcy case reestablishes the rights of the parties as they existed when the petition was filed and restores the pre-bankruptcy status quo.** *In re Serrato*, 214 B.R. 219 (Bkrtcy.N.D.Cal., 1997); *In re Johnson*, 210 B.R. 134 (Bkrtcy.W.D.Tenn., 1997); *In re Walter*, 199 B.R. 390 (Bkrtcy.C.D.Ill., 1996); *Matter of Pruitt*, 203 B.R. 134 (Bkrtcy.N.D.Ind., 1996); *In re County of Orange*, 183 B.R. 594 (Bkrtcy.C.D.Cal., 1995); *In re Irons*, 173 B.R. 910 (Bkrtcy.E.D.Ark., 1994).

The reason for this Court to grant review is that *res judicata* and/or collateral estoppel will not only preclude issues brought to the state court following a dismissed bankruptcy, but it will also prevent parties from bringing legitimate claims that should be brought to state court despite preliminary bankruptcy court decisions. Therefore, it is important that the United States Supreme Court ask itself whether in fact it wants this far-reaching effect. Some of the questions with respect to such, which illustrate the drastic changes effectuated by the Idaho Supreme Court's decision in this case, would be as follows:

(1) *Proof of Claims.* Under § 502(a) of the Bankruptcy Code, a Proof of Claim is presumed allowed unless a party objects to the claim. Assume, for the sake of argument, that a plan of reorganization submitted in a Chapter 11, Chapter 12, or Chapter 13 case provides for

fixed amounts to be paid to unsecured creditors on a pro rata basis. Because the plan of reorganizations pays all unsecured creditors pro rata, the debtor would most likely choose not to dispute any of the unsecured claims regardless of their amount. Because the amount of the unsecured claims would not alter the amount to be paid by the debtor, and because any challenge of the claims would be cost prohibitive, the debtor would allow the court to presume the debt's legitimacy. If the case is then dismissed, can that creditor then rely on the provisions of § 502(a) to assert that the claim should be allowed in a subsequent state court action regarding the same debt?

(2) *Lift of Stay.* Sections 361 and 362 of the Bankruptcy Code allow the automatic stay imposed upon filing bankruptcy to be lifted for certain purposes. One of the issues that may be resolved through the lift of stay proceedings is the value of property. If the case then ultimately gets dismissed, would the Court then be required to rely upon the value of the property used to obtain a lift of the automatic stay for whatever purpose it may have in a state court action?

(3) *Determination of Debt Status.* One of the determinations under § 506 of the Bankruptcy Code is whether a party is secured or unsecured. Because of the value of the collateral, a creditor's claim may be partly secured and partly unsecured. This creditor is frequently referred to as an under-secured creditor. For example, the debt may be $500,000, the value of the property ultimately may be found to be $400,000 thus making the party unsecured to the extent of $100,000. If a plan of reorganization is then developed and approved, and the bankruptcy is subsequently dismissed, can the debtor argue in a subsequent state court action that he or she must pay only a part of

the debt because the plan was confirmed in a preliminary bankruptcy court proceeding prior to the ultimate discharge? Should the debtor be able to rely on the plan confirmation proceeding and assert the doctrines of *res judicata* and/or collateral estoppel even though the bankruptcy case was dismissed?

(4) *Fraud.* Section 523(a) the Bankruptcy Code provides that one can object to a discharge of a bankruptcy on the basis of fraud. However, in the case of *Grogan v. Garner*, 498 U.S. 279 (1991), this Court ruled that in a bankruptcy case, fraud can be determined only by a preponderance of the evidence. Can a state court therefore rely upon the bankruptcy court's determination of fraud only by a preponderance of the evidence when, in fact, in order to prove fraud under state law in the state of Idaho, it must be clear and convincing evidence? See *Lindberg v. Roseth*, 46 P.3d 518 (Idaho, 2002); and *Sowards v. Rathbun*, 8 P.3d 1245 (Idaho, 2001). It is believed that Idaho uses the prevailing view among state courts with respect to the level of proof required to show fraud.

(5) *Lien Avoidance.* One of the things that occurs with respect to a bankruptcy is lien avoidance. If a lien is avoided as a preliminary matter in a bankruptcy, and a discharge is subsequently entered, the lien is thereby eliminated. Will that lien avoidance later be sustained in state court if there is a dismissal of the bankruptcy case?

As one can see from the various questions that have been raised and the various circumstances, all of which have not been enumerated, the purpose of 11 U.S.C. § 349 of the Bankruptcy Code is to put the parties back in a status quo as there may be many things that happen in a bankruptcy setting that should not be carried back into

state court. For one to say that the decision made by the presiding bankruptcy judge in the Neibaurs' Chapter 12 proceedings is *res judicata*, or that collateral estoppel applies without looking to and applying § 349, creates havoc with respect to what parties may assert after a bankruptcy has been dismissed and an action is back in state court. It is therefore imperative that this Court determines the effect of § 349 of the Bankruptcy Code on subsequent state court proceedings. In the Neibaur cases the bankruptcy judge did not find that the cases were dismissed for cause, which he could have done. Furthermore, the Elliotts could have asked the bankruptcy court to enter a ruling that the dismissal was for cause, and also could have asked the court to make a ruling that the decision entered in the adversary action was a final judgment upon which the state court could rely. Elliotts failed to do either.

CONCLUSION

A review of 11 U.S.C. § 349 and its legislative history demonstrates that the Idaho Supreme Court erred in applying the doctrine of *res judicata* and/or collateral estoppel; that there was no final judgment upon which the state court could rely; and, therefore, the Neibaurs were erroneously precluded from asserting their contract defenses in the state court proceedings. If the decision of the Idaho Supreme Court is allowed to stand it will create havoc across the United States in any court that may rely upon the Idaho Supreme Court's decision in determining that whatever happens in bankruptcy court, irrespective of circumstances, will be found to be a final decision upon which a state court can rely, which is certainly contrary to

the provisions of 11 U.S.C. § 349; and, therefore, this matter should be heard by this Court to resolve the issue of the effect 11 U.S.C. § 349 has upon other subsequent court proceedings.

It is respectfully requested that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 28232/28233

EDWARD G. ELLIOTT and MARY L. ELLIOTT, husband and wife,	
- Plaintiffs-Respondents,	**Boise, March 2003 Term**
v.	**2003 Opinion No. 42**
DARWIN NEIBAUR FARMS, an Idaho general partnership; DARWIN NEIBAUR and JUNE NEIBAUR, husband and wife,	**Filed: April 8, 2003**
Defendants-Appellants,	**Frederick C. Lyon, Clerk**
and	
GREEN LINE SALES, INC., an Idaho corporation; HANSEN and L. PATRICIA HANSEN, husband and wife; DARWIN P. NEIBAUR, a single man, JUNE G. NEIBAUR, a single woman; DARWIN P. NEIBAUR; JUNE G. NEUBAUR; STEVE NEIBAUR, a.k.a. BURKE VEARL NEIBAUR; IRA NEIBAUR, a.k.a. IRA LYNN NEIBAUR; RENEA HARTLEY, a.k.a. RENEA N. HARTLEY, CORINNE JONES, a.k.a. CORINNE N. JONES, DANA LEE DORSEY, a.k.a. DANA LEE N. DORSEY;	

JUNE G. NEIBAUR, as Trustee for BURKE VEARL NEIBAUR and IRA LYNN NEIBAUR d/b/a DARWIN NEIBAUR FARMS PARTNERSHIP; EDWARD K. HEINER and ZINA L. HEINER, husband and wife; KEY BANK OF IDAHO, a banking corporation; VALLEY BANK, a banking company; FIRST SECURITY BANK OF IDAHO, N.A., a banking company,

Defendants.

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Minidoka County. Hon. Monte B. Carlson, District Judge.

Judgment and order of foreclosure of real property mortgage, *affirmed.*

Westburg, McCabe & Collins, Boise, for appellant Darwin Neibaur Farms. P. Larry Westberg argued.

Ling & Robinson, Rupert, for appellants Darwin and June Neibaur. Brent T. Robinson argued.

Charles J. Nicholas, Boise, argued for respondents.

WALTERS, Justice.

This case involves the foreclosure of a mortgage on real property. The district court entered judgment allowing Edward and Mary Elliott to foreclose a mortgage on property owned by Darwin Neibaur Farms, a partnership, over the objection by Neibaur Farms and Darwin and June Neibaur, individually, that the parties' contracts required the Elliotts to foreclose first on property owned by John and Patricia Hansen before foreclosing on the Neibaurs' property. We affirm.

FACTS AND PROCEDURAL BACKGROUND

In October 1982, Edward and Mary Elliott entered into a contract for the sale of the John Deere dealership business and a land sale contract for the real property that the business was located upon in Burley, Idaho. The buyer was Green Line Sales, Inc. John and Patricia Hansen and Darwin and June Neibaur, among others, were shareholders in Green Line Sales, Inc. Promissory notes were given to the Elliotts and guaranteed by the shareholders. Two mortgages were given to the Elliotts as security for the guarantees made by the shareholders pursuant to the business contract; the Hansens granted a mortgage against real property owned by them, and the Neibaurs granted a mortgage against real property that they owned.

There were two conditions pertaining to the mortgages. First, if the indebtedness on the business sale contract dropped below a certain dollar amount, the Neibaurs' mortgage would be released. Second, in the event that the Elliotts should simultaneously foreclose on the mortgages, the Hansens' property would be sold first to satisfy the debt. If the proceeds from the sale of the Hansens'

property were insufficient, the Elliotts would then foreclose on the Neibaurs' property.

The farm economy in the Burley area took a serious downturn in the late 1980's and early 1990's. Efforts were made to keep current with the payments pursuant to the business contract, including a modification agreement in 1991. Despite these efforts, Green Line Sales, Inc., defaulted upon the promissory notes for both the business sale contract and the land sale contract.

The Elliotts demanded full payment on the notes in May 1993 and initiated a single action against the Hansens and the Neibaurs to foreclose on both mortgages. The Elliotts and the Hansens later entered into a stipulation whereby the Hansens would pay the Elliotts at least half of the amounts owed on the promissory notes, in exchange for the Hansens' property not being sold in a foreclosure proceeding. A Stipulation and Order for Sale, Foreclosure of Mortgages and Entry of Judgments, and a Stipulation for Settlement and Order entered into between the Elliotts and the Hansens were filed in March 1994. The Neibaurs were not involved in the negotiations or settlement agreements between the Elliotts and the Hansens.

Following the stipulations, the Neibaurs filed a motion for summary judgment alleging a statute of limitation defense and the absence of a contractual condition precedent which required the Elliotts to conduct a foreclosure sale of the Hansens' property prior to foreclosing on the Neibaurs' property. The district court granted partial summary judgment and held that the foreclosure action against the Neibaurs was time-barred. The district court entered an order dismissing the foreclosure action against the Neibaurs and dismissed Neibaur Farms, with prejudice.

The district court declined to enter an I.R.C.P. 54(b) certificate on the order at that time but directed that the question of certification be heard by a separate motion.[1] In April 1995, the Elliotts and the Hansens entered into an additional stipulation.

In January 1995, the Neibaurs filed for Chapter 12 relief with the U.S. Bankruptcy Court. During the course of the Chapter 12 proceeding, the Neibaurs disputed the validity of the Elliotts' claim. The bankruptcy court issued its memorandum decision finding that the Neibaurs' defenses of impossibility, impracticability and frustration of purpose did not excuse the Neibaurs' performance, nor did the statute of limitation bar the Elliotts' foreclosure action. The bankruptcy court then dismissed the Neibaurs' petition. The decision of the bankruptcy court was upheld on appeal.

Following the dismissal of the bankruptcy petition, the Elliotts filed a motion for partial summary judgment requesting that the district court rule that all of the Neibaurs' claims and defenses had been adjudicated and disposed of by the bankruptcy court. The Neibaurs filed another motion for partial summary judgment asserting the I.C. § 6-101 'one-action rule' and statute of limitation as grounds. On December 18, 1997, the district court granted the Elliotts' motion for partial summary judgment. The court held that collateral estoppel barred re-adjudication of the claims decided by the bankruptcy

---

[1] There was never a separate motion or hearing, so the 54(b) certificate was not entered. This made the partial judgment non-final and the court later reconsidered its ruling with respect to the statute of limitation defense.

court. The district court took under advisement the Neibaurs' arguments concerning the one-action rule.

On January 9, 1998, the district court issued its opinion on the Neibaurs' I.C. § 6-101 claim. The court *sua sponte* reversed its decision that the Neibaurs' mortgage was time-barred. A trial was held, and the district court entered its findings of fact and conclusions of law. The district court concluded that the Elliotts did not have to foreclose and sell the Hansens' property before foreclosing on the Neibaurs' property. The district court further determined that the Neibaurs had bargained away their statute of limitation defense and such bargaining inured to the detriment of Neibaur Farms. Attorney fees were awarded by the district court to the Elliotts as the prevailing party. An Amended Judgment and Decree of Foreclosure was filed on January 30, 2003. The Neibaurs and Neibaur Farms appeal.

ISSUES PRESENTED ON APPEAL

1. Did the district court err in entering a decree of foreclosure of the Neibaurs' mortgage in the absence of a condition precedent, i.e., the foreclosure sale of the land covered by the Hansens' mortgage?

2. Did the district court err by exercising jurisdiction over the foreclosure of the Neibaurs' mortgage?

3. Did the district court err by allowing the Elliotts to proceed with a foreclosure action and holding that the 'one-action' rule of Idaho Code § 6-101 inapplicable?

4. Did the district court err in holding that foreclosure of the Neibaurs' mortgage was not barred by the applicable statute of limitation?

5. Did the district court err in holding that certain of Neibaurs' arguments and defenses were precluded from trial by the doctrines of *res judicata* and collateral estoppel based on the bankruptcy action which was ultimately dismissed?

6. Did the district court err by *sua sponte* reversing the summary judgment previously entered in favor of Neibaur Farms?

7. Did the district court err in awarding fees and in its method of calculating attorney fees for the Elliotts at trial?

8. Are any of the parties entitled to attorney fees on appeal?

STANDARD OF REVIEW

In an appeal from an order granting summary judgment, this Court uses the same standard of review as the district court did in ruling upon the motion. *Baxter v. Craney,* 135 Idaho 166, 170, 16 P.3d 263, 267 (2000). Summary judgment is appropriate only when the pleadings, depositions, affidavits and admissions on file show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. I.R.C.P. 56(c).

Generally, when considering a motion for summary judgment, this Court liberally construes the record in the light most favorable to the party opposing the motion, drawing all reasonable inferences and conclusions in that party's favor. *Construction Management Systems, Inc. v.*

Assurance Co. of America, 135 Idaho 680, 682, 23 P.2d 142, 144 (2001). However, where the evidentiary facts are undisputed and the trial court rather than a jury will be the trier of fact, "summary judgment is appropriate, despite the possibility of conflicting inferences because the court alone will be responsible for resolving the conflict between those inferences." *Riverside Development Co. v. Ritchie,* 103 Idaho 515, 519, 650 P.2d 657, 661 (1982); *see also Cameron v. Neal,* 130 Idaho 898, 900, 950 P.2d 1237, 1239 (1997).

DISCUSSION

I.

Foreclosure Requirement

The Neibaurs and Neibaur Farms contend that the clear and unambiguous language of the mortgages require that there must first be a foreclosure sale of the Hansens' property prior to a foreclosure sale on the Neibaurs' property and that the Hansens' property shall be sold first.

The Elliotts agree that the language of the mortgages is clear and unambiguous. However, the Elliotts argue that the provisions for foreclosure on either of the mortgages were elective and permissive. The Elliotts point out that both the Neibaurs and Neibaur Farms benefited from the Hansens entering into the stipulations; the Hansens personally paid $750,000 to avoid foreclosure on their farm, which was worth $135,000 at the time of trial, and agreed further to pay an additional $120,000, which greatly reduced the amount of liability on the promissory notes.

Paragraph 10 in both mortgages provides:

> 10. In the event of default by Green Line Sales Inc. in the payment of the promissory note guaranteed by the Mortgagor or in the event of any other default by Green Line Sales Inc. which gives right to the Mortgagee to enforce the terms of the note and any security instruments securing the payment of said note it is expressly agreed that the Mortgagee, prior to the foreclosure of this mortgage, shall be required to foreclose against any security it has involving Green Line Sales Inc. In the event that the proceeds from the said security are insufficient to retire the indebtedness owed to Mortgagee, then in such event the Mortgagee may foreclose this Mortgage under the laws of the State of Idaho.

The Hansens' mortgage further provides:

> The Mortgagor further covenants and agrees that Darwin P. Neibaur and June G. Neibaur have likewise and simultaneously executed a Mortgage to the Mortgagee for the same purposes and under the same terms and conditions as this Mortgage (with the exception of the real estate description) and that in the event the Mortgagee forecloses this mortgage, subject to its conditions precedent, the Mortgagee may foreclose the Neibaur mortgage and this mortgage simultaneously and in the event of a foreclosure sale the property in this mortgage shall be sold first prior to the sale of the Neibaur property. The Mortgagor has agreed with Neibaur as to this covenant.

The Neibaurs' mortgage similarly states:

> The Mortgagor further covenants and agrees that John D. Hansen and L. Patricia Hansen, have likewise and simultaneously executed a Mortgage to the Mortgagee for the same purposes and under the same terms and conditions as this Mortgage (with the exception of the real estate description) and that in the event the Mortgagee forecloses this mortgage, subject to its conditions precedent, the Mortgagee may foreclose the Hansen mortgage and this mortgage simultaneously and in the event of a foreclosure sale of the property in this mortgage shall be sold subsequent to the sale of the Hansen property. This Mortgagor has agreed with Hansen as to this covenant.

This Court in *Albee v. Judy,* 136 Idaho 226, 230, 31 P.3d 248, 252 (2001), held:

> Construction of the meaning of a contract begins with the language of the contract. "If the contract's terms are 'clear and unambiguous, the determination of the contract's meaning and legal effect are questions of law . . . . and the meaning of the contract and intent of the parties must be determined from the plain meaning of the contract's own words." If, however, the contract is determined to be ambiguous, "the interpretation of the document is a question of fact which focuses upon the intent of the parties."

Id. (citations omitted). In determining whether a contract is ambiguous, this Court ascertains whether the contract is "reasonably subject to conflicting interpretation." *Bondy v. Levy,* 121 Idaho 993, 996, 829 P.2d 1342, 1345 (1992). "The determination and legal effect of a contractual

provision is a question of law where the contract is clear and unambiguous, and courts cannot revise the contract in order to change or make a better agreement for the parties." *Id.* at 997, 829 P.2d at 1346.

The district court concluded that the language of the mortgages was unambiguous and that this language determined the parties' rights. The district court held that in the event of a joint mortgage foreclosure, the Hansens' property should be foreclosed upon and sold first. The district court determined that because this was not a joint foreclosure sale, the foreclosure on the Hansens' property was permissive. The district court stated that the language of the contract was not "a prohibition against making a deal with Hansens, equal to or better than the value of their mortgaged property, and then foreclosing against the Neibaurs. The obvious purpose of the language was to look first to the Hansens, then to the Neibaurs. That is exactly what the Elliotts did."

The language of the mortgages appears to be free from conflicting interpretations by reasonable people. *Bondy,* 121 Idaho at 996, 829 P.2d at 1345. The mortgages both provide that the Elliotts "may foreclose this Mortgage under the laws of the State of Idaho." The mortgages further provide that the Elliotts "may foreclose" the Hansens' and the Neibaurs' mortgages simultaneously and in the event of a foreclosure sale, the Hansens' property shall be sold prior to the sale of the Neibaurs' property. The language clearly contemplates that the Elliotts can simultaneously foreclose on the properties and in which case, the Hansens' property should be sold first. The language of the mortgages, however, does not *require* that the Elliotts must simultaneously foreclose or that the Elliotts must sell the Hansens' property first before the

Elliotts are allowed to foreclose on the Neibaurs' property, as the Neibaurs contend.

This Court affirms the district court's finding that the language of the mortgages was unambiguous. This Court further holds that the conditions in the mortgages did not prevent the Elliotts from entering into a stipulation for payment by the Hansens of at least one-half of the amount owed on the promissory notes in lieu of foreclosing on their property, particularly where the amount paid by the Hansens exceeded the value of the property held as security.

II.

Jurisdiction to Determine Deficiency

The Neibaurs argue that the district court did not have jurisdiction pursuant to I.C. § 6-108 to determine a deficiency because the court could not have calculated the balance due on the promissory notes without first foreclosing on the Hansens' property. The Neibaurs contend that without a foreclosure on the Hansens' property, the deficiency amount cannot be made except by speculation. The Neibaurs assert that by entering into the stipulation agreement, the Elliotts and the Hansens deprived the district court of jurisdiction to calculate a deficiency. The Neibaurs aver that the district court by allowing the Elliotts to foreclose on the Neibaurs' property rendered a number of essential rights and procedures ineffective. The other appellant, Neibaur Farms, points out that it was not a party to the modification agreement dated September 30, 1991, that was entered into by the Elliotts and the Hansens and satisfied a part of the debt.

Idaho Code § 6-108 provides:

> No court in the state of Idaho shall have jurisdiction to enter a deficiency judgment in any case involving a foreclosure of a mortgage on real property in any amount greater than the difference between the mortgage indebtedness, as determined by the decree, plus costs of foreclosure and sale, and the reasonable value of the mortgaged property, to be determined by the court in the decree upon the taking of evidence of such value.

The district court noted in its opinion that the Neibaurs admitted that they owed the obligation evidenced by the land contract and promissory note in the amount of $53,906.20 plus interest; the district court entered judgment on this amount. The district court ordered that the Elliotts could proceed with the foreclosure on the Neibaurs' property. The district court ordered that following the sale, the proceeds from the sale would be applied to the judgment on the promissory notes. The district court utilized the amounts stipulated by the Elliotts and the Hansens to determine the remaining amounts owed on the promissory notes.

This Court holds that the district court did not lack jurisdiction to calculate the deficiency. There is sufficient evidence in the record for the district court to make this calculation, and this Court affirms the district court's determination of the deficiency.

III.

One-Action Rule

The Neibaurs argue that by the Elliotts removing the condition that the Hansens' property be sold prior to the sale of the Neibaurs' property, the security has been destroyed or ceases to exist. The Neibaurs contend that the Elliotts cannot proceed against the Hansens as a result of the stipulations they entered into, and therefore cannot proceed against the Neibaurs' property because of the one-action rule. The Neibaurs contend that the Elliotts have placed themselves in a position where their security has become valueless because of their own fault, acts or conduct.

The one-action rule, Idaho Code § 6-101, provides in pertinent part:

> (1) There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate which action must be in accordance with the provisions of this chapter. In such action the court may, by its judgment, direct a sale of the incumbered property (or so much thereof as may be necessary) and the application of the proceeds of the sale to the payment of the costs of the court and the expenses of the sale, and the amount due to the plaintiff; and sales of real estate under judgments of foreclosure of mortgages and liens are subject to redemption as in the case of sales under execution; (and if it appears from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt), and it becomes a lien on the real estate of

> such judgment debtor, as in other cases on which execution may be issued.

The policy behind the single-action statute was explained in *Jeppesen v. Rexburg State Bank,* 57 Idaho 94, 99, 62 P.2d 1369, 1371 (1936), quoted in *Frazier v. Neilsen & Co.,* 115 Idaho 739, 740, 769 P.2d 1111, 1112 (1989):

> When a debtor gives a mortgage to secure his debt, he gives his creditor a lien on his property and thereby authorizes him, at maturity of the debt, to proceed *in rem* against the property for the amount of the debt. This necessarily impairs the debtor's credit to that extent; and it was the evident intention of the legislature, by enacting sec. 9-101 [the predecessor of I.C. § 6-101], to require the creditor to proceed for collection of the debt (if not paid in due course) against the property, and to exhaust the security before being allowed to acquire any personal judgment against the debtor. In other words, it was intended not to allow the creditor to hold an incumbrance on his debtor's property, and at the same time proceed against him for a personal judgment, either with or without attachment, for to allow the creditor to do so might, in any case, result in impairing the debtor's credit in at least double the amount of his debt; that is, both *in rem* and *in personam.* This statute avoids a multiplicity of suits against the same debtor. (Citations omitted.)

The Idaho Court of Appeals has applied I.C. § 6-101, holding that the payment of a debt secured by a mortgage must first be sought from the mortgaged property. *Federal Land Bank of Spokane v. Parsons,* 118 Idaho 324, 327, 796 P.2d 533, 536 (Ct. App. 1990). "To collect on the debt, the mortgage must be foreclosed. The creditor may not simply

sue on the debt and collect by execution on the judgment." *Federal Land Bank of Spokane v. Parsons,* 116 Idaho 545, 549, 777 P.2d 1218, 1222 (Ct. App. 1989). "Only if there is a deficiency, will the mortgagee be allowed to pursue the other assets of the mortgage debtor." *Federal Land Bank,* 118 Idaho at 327, 796 P.2d at 536.

After citing to Idaho cases dealing with the one-action rule, the district court determined "that [the] Elliotts must foreclose their mortgage on the Neibaur property before judgment against the Neibaurs may enter upon the Business Promissory Note. [The] Neibaurs' obligations under the Business Promissory Note and their guaranty thereof, is not enforceable in terms of a personal judgment until their mortgaged property has been foreclosed, the property sold, and the proceeds thereof applied to the obligation."

We conclude that the Elliotts' stipulations with the Hansens do not render the Elliotts' security interest in the Neibaurs' property valueless, because the Elliotts were simply undertaking to collect part of the indebtedness from the Hansens prior to collecting from the Neibaurs as the contractual obligations permitted. The Elliotts followed the proper course by proceeding to foreclose upon the Hansens' and Neibaurs' property in order to obtain repayment of the debt evidenced by the promissory notes. *Parsons,* 116 Idaho at 549, 777 P.2d at 1222. The Elliotts reached a settlement with the Hansens for a portion of the debt. Under the one-action rule, the Neibaurs' property still retains value as the Elliotts have not attempted to sue directly on the debt and to collect by execution of a judgment for the debt. *See id.* The Neibaurs' property remains subject to the mortgage securing the promissory notes for the business and land contracts with the Elliotts. If the

amount received from the foreclosure sale is insufficient to repay the debt, only then would the Elliotts be allowed to pursue the other assets of the Neibaurs. *Federal Land Bank,* 118 Idaho at 327, 796 P.2d at 536. The fact that the Elliotts reached a settlement with the Hansens in lieu of foreclosure on the Hansens' property does not affect the application of the one-action rule with respect to the foreclosure of the mortgage on the Neibaurs' property.

This Court holds that the parties' agreement permissively allowed the Elliotts to foreclose on the Neibaurs' property without first foreclosing on the Hansens' property. The district court's decision in that regard is affirmed.

IV.

Statute of Limitation

The Neibaurs contend that the action filed by the Elliotts was not filed within the applicable statute of limitation prescribed by I.C. § 5-214A. While the promissory notes recited that final payment of the principal balance would be due on November 15, 1990, the mortgages did not contain a maturity date. Because no maturity date was listed in the mortgage, the Neibaurs argue that the five-year statute should be deemed to establish the date of maturity of the indebtedness. They point out that the foreclosure action filed by the Elliotts was beyond the five-year period. Neibaur Farms likewise contends that the five-year statute of limitation expired on October 27, 1987, because the mortgage did not state a maturity date. Neibaur Farms point out that this foreclosure action was not commenced until May 24, 1993.

Idaho Code § 5-214A provides:

> An action for the foreclosure of a mortgage on real property must be commenced within five (5) years from the maturity date of the obligation or indebtedness secured by such mortgage. If the obligation or indebtedness secured by such mortgage does not state a maturity date, then the date of the accrual of the cause of action giving rise to the right to foreclose shall be deemed the date of maturity of such obligation or indebtedness.

The district court initially ruled that the Elliotts' action on the Neibaurs' mortgage was time-barred by I.C. § 5-214A. The district court found that the mortgage was recorded on October 28, 1982, did not contain a maturity date, and that the action initiated by the Elliotts was not filed until May 1993, which was outside the five-year requirement of I.C. § 5-214A. The district court later reconsidered its ruling, however. The district court concluded that although its earlier determination was correct at the time it was rendered, upon further review of the record and documents filed in the action, the Neibaurs had "bargained away their limitations defense by acknowledging that they had a continued obligation under the promissory notes." In addition, the district court decided that issue preclusion applied to this instance since the bankruptcy court had the full and fair opportunity to litigate this issue.

The bankruptcy court found that the Neibaurs' statute of limitation defense was implicated by the modification of the business and land sale contracts in 1991. The bankruptcy court held "[a]t that time, accommodations for any existing defaults were made by the parties, and [Neibaurs]

acknowledged the continuing vitality of their debt to the Elliotts in the modification agreement. Whatever the status of the notes at that date, any limitations defense to the debts were bargained away by [Neibaurs] as part of the modification."

This case appears to fall under the second provision of I.C. § 5-214A: "If the obligation or indebtedness secured by such mortgage does not state a maturity date, then the date of the accrual of the cause of action giving rise to the right to foreclose shall be deemed the date of maturity of such obligation or indebtedness." Although the promissory notes did not contain a stated maturity date, it was clear that the debt was to be paid over a period of time longer than a five-year term, given that the promissory notes provided the final payment was to be made on January 2, 1990. This fact makes the Neibaurs' argument concerning the alleged defect in a maturity date for the mortgage unpersuasive. The recorded mortgage, when reviewed in conjunction with the promissory note that the mortgage secured, provides substantial compliance with the requirement of notice to the public of the maturity date of the mortgage, since the two related instruments together provide "the means . . . to ascertain the date of maturity or whether the obligation is not mature." *Gebrueder Heidemann, K.G. v. A.M.R. Corp.*, 107 Idaho 275, 281, 688 P.2d 1180, 1186 (1984).

Finally, the parties entered into a stipulation in September 1991, to extend the period of repayment. As both the district court and bankruptcy court observed, the Neibaurs were well aware that the debt was still owed to the Elliotts and in consideration for the extension of time for repayment on the promissory notes, the Neibaurs' statute of limitation defense was waived.

This Court holds that the action on the Neibaurs' mortgage was not time-barred by I.C. § 5-214A.

V.

Res Judicata and Collateral Estoppel

The Neibaurs next contend that the district court erred in granting partial summary judgment against them on issues that were resolved in the Neibaurs' bankruptcy proceeding. The Neibaurs assert that the dismissal of the bankruptcy action reinstates all issues and allows the parties to proceed as if the bankruptcy petition had not been filed. Because the bankruptcy petition was dismissed, the Neibaurs argue that there was no final judgment and thus, the doctrines of *res judicata* and collateral estoppel should not apply.

Neibaur Farms also argues that the district court mistakenly relied in part upon the bankruptcy proceeding. It asserts that it was not a party to the bankruptcy proceeding and should not be bound by the bankruptcy court's decisions. Moreover, Neibaur Farms points out that the property at issue was owned by Neibaur Farms not the Neibaurs individually, who were the parties seeking bankruptcy relief.

Whether collateral estoppel bars the relitigation of issues adjudicated in prior litigation between the same parties is a question of law subject to free review on appeal. *Mastrangelo v. Sandstrom, Inc.*, 137 Idaho 844, 846, 55 P.3d 298, 300 (2002). The Court recently explained:

> Res judicata is comprised of claim preclusion (true res judicata) and issue preclusion (collateral estoppel). Under principles of claim preclusion, a

> valid final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties upon the same claim. The three fundamental purposes served by res judicata are:
>
> > First, it "[preserves] the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results." Second, it serves the public interest in protecting the courts against the burdens of repetitious litigation; and third, it advances the private interest in repose from the harassment of repetitive claims.
>
> The doctrine of claim preclusion bars not only subsequent relitigation of a claim previously asserted, but also subsequent relitigation of any claims relating to the same cause of action which were actually made or which might have been made.

Hindmarsh v. Mock, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002) (citations omitted).

Here, the district court found that the Neibaurs' defenses of the statute of limitation and equitable doctrines of impossibility, impracticability and frustration of purpose had been fully litigated before the bankruptcy court. The district court therefore determined that collateral estoppel prevented the Neibaurs from relitigating those issues.

According to the bankruptcy court's written decision, the court conducted an evidentiary hearing "that consumed several days to accommodate the testimony of the

many witnesses. Hundreds of pages of documentary evidence was received." The bankruptcy court addressed the Neibaurs' contention "that the Elliotts' claim should be disallowed completely, arguing that the claim is barred by the applicable statutes of limitation" and the contention that "they are otherwise excused from paying the claim by case law doctrines of impossibility of performance, and impracticability or frustration of purpose." The bankruptcy court held that the Neibaurs were not excused from the performance of the agreements with the Elliotts under either theory. The bankruptcy court found that the Neibaurs were ineligible for the relief that they sought under Chapter 12. The Neibaurs sought to convert to a Chapter 11 proceeding, however, the bankruptcy court concluded "that conversion would be a useless gesture, not likely to result in confirmed plans." The bankruptcy court stated that the Neibaurs "appear to have made peace with most of their major creditors. However, their desire to continue the battle with the Elliotts leads this Court to conclude further reorganization efforts will by [sic] fruitless." The bankruptcy court then dismissed the Neibaurs' case.

From the record, it appears that the proceeding before the bankruptcy court resulted in "a valid final judgment rendered on the merits by a court of competent jurisdiction" which should serve as a bar to a subsequent action between the parties upon the statute of limitation and equitable defenses claims. *Hindmarsh,* 138 Idaho at 94, 57 P.3d at 805. Accordingly, this Court upholds the district court's determination precluding a trial on the Neibaurs' arguments and defenses by operation of the doctrines of *res judicata* and collateral estoppel, based on their bankruptcy case.

VI.

Reconsideration of Partial Summary Judgment

Neibaur Farms argues that the district court erred by *sua sponte* reversing the partial summary judgment ruling on the statute of limitation defense and dismissal of Neibaur Farms. Neibaur Farms contends that it had no expectation of the potential for reversal on the summary judgment that had been ruled on in 1995. The Elliotts contend that the district court had the authority pursuant to I.R.C.P. 11(a)(2)(B) to vacate the partial summary judgment order because it was not a final judgment.

The district court stated, "[t]his court, however, by way of reconsideration, concluded that although its Opinion issued on January 9, 1995, was a correct determination of the law at the time, the agreement entered into by the Neibaurs on September 20, 1991, allows this court to conclude that the Neibaurs bargained away their limitation defense by acknowledging that they had a continuing obligation under the promissory notes."

The district court's grant of partial judgment in January 1995 was not a final judgment and did not preclude the court from later reconsidering the statute of limitation defense. At the time of its ruling in 1995, the district court made it clear that the propriety of a I.R.C.P. 54(b) certificate, which was necessary to make the judgment final and appealable, would have to be heard by a separate motion before being entered. Neither the Neibaurs nor Neibaur Farms requested such a hearing, and the judgment remained a non-final determination.

Rule 11(a)(2)(B) of the Idaho Rules of Civil Procedure specifically provides that a motion for reconsideration of

any interlocutory order of the trial court may be made at any time before entry of final judgment but not later than fourteen (14) days after the entry of final judgment. This Court has repeatedly held that I.R.C.P. 11(a)(2)(B) provides a district court with authority to reconsider and vacate interlocutory orders so long as final judgment has not been entered. *Telford v. Neibaur,* 130 Idaho 932, 950 P.2d 1271 (1998); *Sammis v. Magnetek Inc.,* 130 Idaho 342, 346, 941 P.2d 314, 318 (1997); *Farmers Nat'l Bank v. Shirey,* 126 Idaho 63, 878 P.2d 762 (1994).

The district court addressed the assertion of Neibaur Farms questioning whether, as a separate entity, it should be bound by the district court's change of position with respect to the Neibaurs' limitation defense. The court acknowledged that Neibaur Farms had not signed any promissory note, security agreement or mortgage, and had not filed bankruptcy. The district court recognized that Neibaur Farms was involved only as the present record holder of the mortgaged property, having acquired its interest by quitclaim deeds in February and May 1991. However, the district court held that Neibaur Farms was bound by the Neibaurs' actions. The court noted that subsequent to the deeds to Neibaur Farms, the Neibaurs reaffirmed their mortgage with the Elliotts, and extended it, on September 30, 1991. The district court ruled:

> It was [District Judge Granata's] finding that the Neibaurs had bargained away the time limitation defense, by signing Exhibit 11, the September 30, 1991 Agreement Modifying Promissory Notes, Mortgages, and Security Agreement. Parties to a mortgage can amend the terms of the mortgage and can extend the dates. See Idaho Code, Section 5-214A. Darwin Neibaur Farms takes whatever interest Darwin and June Neibaur

had in this property, and that interest included a mortgage which could have its due date extended.

The Elliotts are entitled to foreclose the mortgage against all parties, including Darwin Neibaur Farms. However, once the property has been foreclosed and sold, there can be no further liability on the part of the partnership.

This Court holds that the district court did not err in *sua sponte* reversing its grant of partial summary judgment to Neibaur Farms.

VII.

Attorney Fees at Trial

The Neibaurs contend that the district court failed to consider all of the factors prescribed by I.R.C.P. 54(e)(3) when determining the amount of attorney fees to award to the Elliotts.[2] The Neibaurs argue that the district court

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[2] I.R.C.P. 54(e)(3) provides:

Rule 54(e)(3) Amount of Attorney Fees. In the event the court grants attorney fees to a party or parties in a civil action it shall consider the following factors in determining the amount of such fees:

(A) The time and labor required.

(B) The novelty and difficulty of the questions.

(C) The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law.

(D) The prevailing charges for like work.

(E) Whether the fee is fixed or contingent.

(Continued on following page)

only considered the factors of time and labor. They assert that the district court must do more than simply recite that I.R.C.P. 54(e)(3) factors were considered, and, instead, the district court should make explicit findings that demonstrate consideration of all of the factors.

A discretionary award of attorney fees is subject to review and vacation only upon a showing of an abuse of discretion. *McCann v. McCann,* ___ Idaho ___, 61 P.3d 585, 595 (2002). To review an exercise of discretion, this Court applies a three-factor test. The three factors are: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the boundaries of this discretion and consistent with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason. *Baxter v. Craney,* 135 Idaho 166, 169, 16 P.3d 263, 266 (2000) (citing *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.,* 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991)).

(F) The time limitations imposed by the client or the circumstances of the case.

(G) The amount involved and the results obtained.

(H) The undesirability of the case.

(I) The nature and length of the professional relationship with the client.

(J) Awards in similar cases.

(K) The reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing a party's case.

(L) Any other factor which the court deems appropriate in the particular case.

The district court acknowledged that the award of attorney fees was within its discretion. The district court pointed out all of the considerations that must be taken before awarding attorney fees including the factors listed in I.R.C.P. 54(e)(3) and stated that it had taken those factors into consideration. The district court then awarded attorney fees to the Elliotts.

It is well settled that I.R.C.P. 54(e)(3) does not require the district court to make detailed findings on each listed factor. The rule merely provides that the district court shall consider the factors, but does not require a finding on each one, as a particular listed factor may or may not be relevant to the outcome. *U.S. Bank Nat'l Ass'n v. Kuenzli,* 134 Idaho 222, 228-29, 999 P.2d 877, 883-84 (2000); *Perkins v. U.S. Transformer West,* 132 Idaho 427, 431-32, 974 P.2d 73, 77-78 (1999); *Post Falls Trailer Park v. Fredekind,* 131 Idaho 634, 638, 962 P.2d 1018, 1012 [sic] (1998); *Empire Fire and Marine Ins. Co. v. North Pacific Ins. Co.,* 127 Idaho 716, 720, 905 P.2d 1025, 1029 (1995); *Brinkman v. Aid Ins. Co.,* 115 Idaho 346, 351, 766 P.2d 1227, 1232 (1988); *Irwin Rogers Ins. Agency, Inc. v. Murphy,* 122 Idaho 270, 277, 833 P.2d 128, 135 (Ct. App. 1992).

This Court holds that the district court did not abuse its discretion in awarding attorney fees to the Elliotts.

VIII.

Attorney Fees on Appeal

All parties request an award of attorney fees for this appeal. The Neibaurs present no authority as the basis for their request, but simply condition their request upon the belief that they will be the prevailing party on the appeal.

Because we have ruled against the Neibaurs on the merits of the appeal, they are not the prevailing party. Their request is, therefore, denied.

Neibaur Farms cites I.C. § 12-121 as the basis for an award of attorney fees on the appeal. That statute permits an award to be made only to a prevailing party. As with the Neibaurs, Neibaur Farms is not the prevailing party on this appeal. The request for an award of fees to Neibaur Farms is therefore denied.

The Elliotts request an award for fees but do not make their claim under either the terms of the contracts, the promissory notes, the guarantees, the mortgages or I.C. § 12-120(3). Their request is premised only upon I.C. § 12-121 (although they cite also Idaho Appellate Rule 41, which addresses the method whereby claims for attorney fees are presented and processed, *see Robbins v. County of Blaine,* 134 Idaho 113, 996 P.2d 813 (2000)). While the Elliotts qualify as the prevailing party to the appeal under I.C. § 12-121, an award pursuant to that statute is discretionary and will be made only where the Court finds that the appeal was "pursued or defended frivolously, unreasonably or without foundation." The issues presented and the arguments made by the Neibaurs and Neibaur Farms on this appeal do not leave this Court with the abiding belief that the appeal was pursued frivolously, unreasonably or without foundation. *Minich v. Gem State Developers, Inc.,* 99 Idaho 911, 918, 591 P.2d 1078, 1085 (1979). The Elliotts' request for an award of attorney fees does not meet the standard of I.C. § 12-121 and is therefore denied.

CONCLUSION

This Court affirms the decision of the district court allowing the Elliotts to foreclose their mortgage on the Neibaurs' property. Costs, but not attorney fees on appeal, are awarded to the Elliotts.

Chief Justice TROUT and Justices SCHROEDER, KIDWELL and EISMANN, CONCUR.

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR CASSIA COUNTY

EDWARD G. ELLIOTT and MARY ELLIOTT, husband and wife, Plaintiffs, vs. GREEN LINE SALES, INC., et al., Defendants.	CASE NO. CV 93-00380 D **OPINION AND ORDER RE MOTION FOR SUMMARY JUDGMENT** (Filed Jan. 9, 1998)

THIS MOTION came before the above-entitled court at Burley, Cassia County, Idaho, on December 18, 1997, with the Honorable George Granata Jr., District Judge, presiding. Charles J. Nicholas, Attorney at Law, represented the plaintiff; Brent T. Robinson, Attorney at Law, represented the defendants Darwin P. Neibaur and June G. Neibaur. Larry Westberg was present, for Darwin Neibaur Farms, a partnership, although he did not argue the motion. The court heard oral argument on the Defendants' Neibaurs' Motion for Summary Judgment, after which the matter was taken under advisement. Being advised in the law and in the premises, the court issues the following Opinion and Order:

STATEMENT OF FACTS

On October 15, 1982, Darwin P. Neibaur, June G. Neibaur, John D. Hansen, L. Patricia Hansen, Edward K. Heiner, and Zina L. Heiner formed a partnership to

purchase real property located in Cassia County, Idaho, from Edward G. Elliott and Mary L. Elliott. These parties entered into an agreement for the purchase and sale of an existing John Deere agricultural dealership from the Elliotts. The individual partners gave the Elliotts a promissory note for the purchase price of $1,100,000 for the real property and secured the note with a mortgage on the real property purchased.

Green Line Sales, Inc., purchased the agricultural dealership from the Elliotts. The individual partners gave the Elliotts a promissory note for $1,024,000 and Darwin P. Neibaur, June G. Neibaur, John D. Hansen, and L. Patricia Hansen secured their obligations on the note with mortgages on parcels of real property owned by each of the couples. The notes for both the purchase of the land and for the purchase of the business were placed in escrow with Land Title and Escrow in Burley, Idaho.[1]

On September 30, 1991, the Neibaurs entered into an agreement in which they reaffirmed their obligations under the promissory notes, including the delinquent interest rates. In this agreement, the Elliotts agreed to several modifications, including a $700,000 reduction in the principal under the Green Line Sales promissory note.

On August 10, 1993, the Elliotts filed a complaint in Cassia County District Court seeking to foreclose on the security for the two notes. After this lawsuit was filed, Green Line Sales, Inc., and the partnership, Neibaur

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[1] The note for the purchase of the real property was placed in Escrow #1653 and the note for the purchase of the business was placed in Escrow #1652.

Farms, agreed with the Elliotts to allow the business and its assets to be sold. On March 11, 1994, this court approved a stipulated agreement allowing a third party to purchase the dealership and the real property for cash and allowing the proceeds of such sale to be applied to the debt.

On September 10, 1993, the Elliotts and the Hansens entered into an agreement entitled Stipulation and Order for Sale, Foreclosure of Mortgages and Entry of Judgments. The Neibaurs, while being aware of this stipulation, refused to sign such. On March 11, 1994, the court, being advised as to the stipulation, ordered the stipulation to be entered and ordered the parties to perform their respective obligations under the stipulation. Green Line Sales, Inc., John D. Hansen and L. Patricia Hansen subsequently defaulted on their obligations under the March 11, 1994, stipulation. Consequently, two additional stipulations were entered into by the Elliotts and the Hansens on March 14, 1994, and April 12, 1995. On April 28, 1995, this court approved the Stipulation for Settlement between the Elliotts and the Hansens and ordered the plaintiffs' causes of action against the Hansens dismissed with prejudice.

On January 9, 1995, this court entered an Order Regarding Partial Summary Judgment in which it dismissed Darwin Neibaur Farms, an Idaho general partnership, from the action with prejudice. The court additionally held that the mortgage dated October 27, 1982, signed by Darwin P. Neibaur and June G. Neibaur, husband and wife, naming Edward G. Elliott and Mary Elliott as mortgagees, was time-barred by I.C. § 5-214A.

On January 27, 1995, the Neibaurs filed for bankruptcy and after a seven day hearing, the bankruptcy court issued a Memorandum of Decision and an Order which overruled the Neibaurs' objections to the Elliotts' proofs of claim, denied the confirmation of their Joint Amended Chapter 12 plan, and granted the Elliotts' Motion to Dismiss the bankruptcy cases. The Bankruptcy Court's decision was subsequently affirmed by the U.S. Bankruptcy Appellate Panel of the Ninth Circuit.

On December 18, 1997, this court heard oral argument on the Plaintiffs' Motion for Partial Summary Judgment, in which the plaintiffs sought a judgment, as a matter of law, that Darwin P. Neibaur and June Neibaur were jointly and severally liable for the balances owing on the two promissory notes. This court granted the plaintiffs' motion as to the Neibaurs' liability and the defenses of impossibility, impracticability and frustration of purpose. In granting the plaintiffs' motion, this court let stand its prior decision, issued on January 9, 1995, holding that the mortgage dated October 27, 1982, was time-barred by I.C. § 5-214A.[2]

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[2] Idaho Code § 5-214A states:

Within five (5) years:

1. An action for the foreclosure of a mortgage on real property must be commenced within five (5) years from the date of maturity, as disclosed by the public record, of the obligation or indebtedness secured by such mortgage or by any indenture or other instrument supplemental thereto, as changed by extension, if any, of the time of maturity, filed for record before the expiration of said period of five (5) years. If the public record does not disclose the date of maturity, when the date of the execution of such mortgage or

(Continued on following page)

SUMMARY JUDGMENT STANDARD

Summary judgment is proper when the pleadings, depositions and admissions, along with any affidavits, "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c); *McCoy v. Lyons*, 120 Idaho 765, 820 P.2d 360 (1991). Where "the record contains conflicting inferences upon which reasonable minds might reach different conclusions, summary judgment must be denied because all doubts are to be resolved against the moving party." *Id.* 120 Idaho at 769, 820 P.2d at 364.

With this rule of law in mind, the court will first address whether a genuine issue of material fact exists herein that would preclude summary judgment. If none are found, the court will then determine whether the defendants Neibaur are entitled to judgment as a matter of law on their motion.

The facts underlying this declaratory relief action are largely agreed upon. The court concludes that there are no genuine issues of material fact that would preclude summary judgment on the issue of whether res judicata prevents the defendants from raising their one action rule defense. In light of this court's subsequent reconsideration and reversal of its previous Order of January 9, 1995 regarding the statute of limitations' preventing an action of foreclosure on the Neibaurs' mortgage; this court determines that such may be potential genuine issues of material fact raised by the parties relating to the agreements entered

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lien shall be deemed the date of maturity of such obligation or indebtedness.

into between the Hansens and Elliotts. Consequently, this court determines that summary judgment cannot be issued on the defendant Neibaur's Motion for Summary Judgment, as it relates to the "one action rule" defense.

OPINION

I.

After a careful review of the Bankruptcy Court's Memorandum of Decision, in which the court rejected the Neibaurs' claim that the promissory note given to the Elliotts is time-barred under the applicable statute of limitations, this court has reconsidered its prior Order Regarding Partial Summary Judgment of January 9, 1995.[3] In that order, the court held that "the mortgage . . . dated October 27, 1982, signed by Darwin P. Neibaur and June G. Neibaur, husband and wife, naming Edward G. Elliott and Mary Elliott as mortgagees recorded on October 28, 1994, in the records of Minidoka County, Idaho, as Instrument No. 327900, was time-barred by section 5-214A, Idaho Code. . . ."

This court, however, now, by way of reconsideration, concludes that although its Opinion issued on January 9,

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[3] In its Memorandum of Decision, the Bankruptcy Court stated that the Neibaurs' argument "conveniently disregards the implications of the formal modifications to their contracts with the Elliotts occurring in 1991. At that time, accommodation for any existing defaults were made by the parties, and Debtors acknowledged the continuing vitality of their debt to the Elliotts in the modification agreement. Whatever the status of the notes at that date, any limitations defense to the debts were bargained away by Debtors as a part of the modification.

1995, was a correct determination of the law at that time,[4] the agreement entered into by the Neibaurs on September 30, 1991, allows this court to conclude that the Neibaurs bargained away their limitations defense by acknowledging that they had a continued obligation under the promissory notes. In making this determination, this court adopts the reasoning set forth by the Bankruptcy Court in its Memorandum of Decision. This court further decides that issue preclusion applies in this instance, as the Neiburs had a full and fair opportunity to litigate this issue before the Bankruptcy Court; the issue decided in the prior bankruptcy proceeding was identical to the issue presently addressed by this court; the issue was decided by the Bankruptcy Court; the Bankruptcy Court issued a final judgment on the merits; and the Neibaurs were a party in the prior litigation. *See Anderson v. Pocatello*, 112 Idaho 176 (1987), for a recitation of the elements of issue preclusion given by the Idaho Supreme Court.

II.

The plaintiffs argue that res judicata prevents the defendants from asserting their "one action rule" defense because they failed to present this defense before the Bankruptcy Court.

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[4] The court's January 9, 1995, order complies with the analysis found in *Gebrueder Heidemann, K.G. v. A.M.R. Corp.*, 107 Idaho 275 (1984), in which the Idaho Supreme Court looked at the maturity date given in the promissory to determine when the statute of limitations would have run under I.C. § 5-214A. *See also McCray v. Twitchell*, 112 Idaho 787 (Ct.App.1987) (applying the analysis of I.C. § 5-214A set out by the Gerueder court).

Res judicata prevents the litigation of causes of action which were finally decided in a previous suit. *Gubler v. Brydon*, 125 Idaho 107, 110, 867 P.2d 981, 984 (1994). The rule of res judicata is that "in an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim, but also as to every matter which might and should have been litigated in the first suit." *Magic Valley Radiology, PA. v. Kolouch*, 123 Idaho 434, 436-437, 849 P.2d 107, 109-10 (1993) (quoting *Joyce v. Murphy Land & Irrigation Co.*, 35 Idaho 549, 553, 208 P. 241, 242-43 (1922)).

The Neibaurs' action, filed in Bankruptcy Court, sought the approval of a Chapter 12 bankruptcy plan. The Bankruptcy Court's Memorandum of Decision and accompanying Order denied the confirmation of the Neibaurs' Joint Amended Chapter 12 Plan, overruled the Neibaurs' objections to the Elliotts' proof of claim, and granted the Elliotts' Motion to Dismiss the bankruptcy case. The Bankruptcy Court did not rule on the "one action rule" defense in its final decision.

This court concludes that although the Neibaurs could have raised the one action rule defense in their bankruptcy action, they were not required to do so. If the defense had been properly argued and determined in the bankruptcy court, the legal doctrine which would be more appropriately used to prohibit the issue from being raised in this action would be collateral estoppel (issue preclusion). As stated previously, the issue was not fully litigated and there was no actual decision made on the issue by the Bankruptcy Court. Consequently, the elements required for issue preclusion cannot be met and therefore

the issue is not prevented from being raised in the action currently before the court.[5]

CONCLUSION

This court, on its own motion, reverses its prior Order of January 9, 1995; therefore, the agreement entered into by the Neibaurs on September 30, 1991, reinstated the force of the original mortgage and resulted in the Neibaurs' relinquishing any statute of limitations' claim which they previously had.

The plaintiffs' res judicata argument is not well-taken, even though the Neibaurs could have raised the one action rule defense in their bankruptcy action, they were not required to do so.

ORDER

NOW, THEREFORE, IT IS ORDERED that the defendants Neibaur's Motion for Summary Judgment is hereby *denied* as to the "one action rule" defense, which would prohibit the plaintiffs' from proceeding in this action.

IT IS FURTHER ORDERED that the plaintiffs' argument that res judicata prevents the defendants from asserting their "one action rule" defense is hereby *denied*.

---

[5] Issue preclusion requires that the issue being sought to be precluded was actually decided in the prior litigation and that the party whom the earlier decision is asserted to have had a full and fair opportunity to litigate the issue. *See Western Indus. v. Kaldveer Assoc., Inc.*, 126 Idaho 541 544, 887 P.2d 1048, 1051 (1994).

IT IS FINALLY ORDERED that the trial set for January 12, 1998, will now proceed at *10:00 a.m.*, rather than 9:00 a.m.

DATED this 9th day of January, 1998.

/s/ George Granata Jr.
GEORGE GRANATA JR.
District Judge

pc: Charles J. Nicholas
Brent T. Robinson
P. Larry Westberg

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

IN RE DARWIN P. NEIBAUR, Debtor.	Case No. 95-00205 Case No. 95-00209
IN RE JUNE G. NEIBAUR, Debtor.	ORDER (Filed Aug. 7, 1996)

For the reasons set forth in the Court's Memorandum of Decision filed herein, and for other good cause;

IT IS HEREBY ORDERED THAT:

1. Debtors' objection to Creditors Elliotts' proof of claim be and is hereby OVERRULED;

2. Confirmation of Debtors' Joint Amended Chapter 12 Plan be and is hereby DENIED;

3. Creditors Elliotts' Motion to Dismiss these bankruptcy cases be and is hereby GRANTED, and this bankruptcy case be and is hereby DISMISSED.

DATED this 7th day of August, 1996.

/s/ Jim D. Pappas
JIM D. PAPPAS
CHIEF U.S.
BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

IN RE JUNE G. NEIBAUR, Debtor.	Case No. 95-00209 Adv. No. 95-6073 ORDER (Filed Aug. 7, 1996)
EDWARD G. ELLIOTT and MARY L. ELLIOTT, Plaintiffs, vs. JUNE G. NEIBAUR, Defendant.	

Based upon the Court's order dismissing the Debtor's bankruptcy case entered this date, and for other good cause;

IT IS HEREBY ORDERED THAT this adversary proceeding be and is hereby DISMISSED.

DATED this 7th day of August, 1996.

/s/ Jim D. Pappas
JIM D. PAPPAS
CHIEF U.S.
BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I mailed a true copy of the document to which this certificate is attached,

to the following named person(s) at the following address(es), on the date shown below:

Office of the U.S. Trustee
P. O. Box 110
Boise, Idaho 83701

Brent T. Robinson, Esq.
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Boise, Idaho 83701

Forrest Hymas
P. O. Box 89
Jerome, Idaho 83338

CASE NO.: 95-6073

CAMERON S. BURKE, CLERK
U.S. BANKRUPTCY COURT
By /s/ [Illegible]
Deputy Clerk

DATED: August 7, 1996

In the Supreme Court of the State of Idaho

EDWARD G. ELLIOTT and MARY L. ELLIOTT, husband and wife, Plaintiffs-Respondents, v. DARWIN NEIBAUR FARMS, an Idaho general partnership, Defendant-Appellant, and GREEN LINE SALES, INC., an Idaho corporation, et al. Defendants.	ORDER DENYING PETITIONS FOR REHEARING NO. 28232/28233 Ref. No. 02RH-11
EDWARD G. ELLIOTT and MARY L. ELLIOTT, husband and wife, Plaintiffs-Respondents, v. DARWIN NEIBAUR and JUNE NEIBAUR, husband and wife, Defendants-Appellants, and GREEN LINE SALES, INC., an Idaho Corporation; et al., Defendants.	

The Appellants, Darwin and June Neibaur, in Docket No. 28233 having filed a PETITION FOR REHEARING on

April 29, 2003 and supporting BRIEF on May 14, 2003 of the Court's Opinion released April 8, 2003; and the Appellant, Darwin Neibaur Farms, in Docket No. 28232 having file a PETITION FOR REHEARING on April 29, 2003, an AMENDED PETITION FOR REHEARING on May 13, 2003 and a supporting BRIEF on May 13, 2003 of the Court's Opinion released April 8, 2003; therefore, after due consideration,

IT IS HEREBY ORDERED that the PETITIONS FOR REHEARING be, and they hereby are, DENIED

DATED this 29th day of May 2003.

By Order of the Supreme Court
/s/ Frederick C. Lyon
Frederick C. Lyon, Clerk

cc: Counsel of Record
West Publishing
Lexis/Nexis
Goller Publishing

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IN THE SUPREME COURT OF THE STATE OF IDAHO

EDWARD G. ELLIOTT AND MARY L. ELLIOTT, husband and wife Plaintiffs-Respondents, vs. DARWIN NEIBAUR FARMS, an Idaho general partnership, Defendant-Appellant.	Docket No. 28232
EDWARD G. ELLIOTT and MARY L. ELLIOTT, husband and wife, Plaintiffs-Respondents, vs. DARWIN NEIBAUR and JUNE NEIBAUR, husband and wife, Defendants-Appellants.	Docket No. 28233 PETITION FOR REHEARING

COME NOW, Darwin Neibaur and June Neibaur, pursuant to Rule 42 of the Idaho Appellate Rules, and

hereby petition this Court for a rehearing of its Decision filed April 8, 2003, affirming the District Court of the Fifth Judicial District.

This Motion is based upon the following grounds:

1. The Court erred in the determination it made with respect to the foreclosure requirement affirming the District Court's decision that the requirement to foreclose the Hansen mortgage first was permissive and not mandatory.

2. The Court erred in its holding pertaining to the District Court's decision that the Bankruptcy Court's decision was a final judgment. More particularly, that this Court did not address the effect of § 349 of the Bankruptcy Code and what effect, if any, it had upon the finality of any and all rulings of the Bankruptcy Court.

3. The Court erred in its determination with respect to jurisdiction of determining deficiency and with respect to the application of the "one-action" rule.

Pursuant to Rule 42 of the Idaho Appellate Rules, Appellant shall file a memorandum in support of this Petition for Rehearing within the time specified therein.

RESPECTFULLY SUBMITTED this 25th day of April, 2003.

LING & ROBINSON
By: /s/ Brent T. Robinson
Brent t. Robinson
Attorney for Darwin
Neibaur & June Neibaur

Supreme Court, U.S.
FILED
OCT 9 - 2003
OFFICE OF THE CLERK

No. 03-361

In The
Supreme Court of the United States

DARWIN NEIBAUR and JUNE NEIBAUR HUSBAND AND WIFE, and DARWIN NEIBAUR FARMS, a Partnership,

Petitioners,

v.

EDWARD G. ELLIOTT and MARY L. ELLIOTT,

Respondents.

On Petition For Writ Of Certiorari To The Idaho Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

CHARLES J. NICHOLAS
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Counsel for Respondents Edward G. Elliott and Mary L. Elliott

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Idaho Supreme Court erred in holding that findings of fact and conclusions of law and orders of dismissal entered by a Bankruptcy Court, and subsequently affirmed on appeal by a Bankruptcy Appellate Panel and the Ninth Circuit Court of Appeals, were *res judicata* as to the issues and defenses decided by the Bankruptcy Court when those issues and defenses were subsequently raised in the Idaho District Court by the Petitioners, Darwin Neibaur and June Neibaur.[1]

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[1] In framing the Question Presented as they have, the Petitioners ignore the fact that they chose to litigate the issues and defenses decided by the Bankruptcy Court in that forum by filing petitions for Chapter 12 bankruptcy relief on the eve of the trial of those matters by the State Court; they ignore the fact that all of those issues and defenses were tried exhaustively before the Bankruptcy Court over a seven day period; they have not informed this Court that they subsequently appealed the Bankruptcy Court's decision to a Bankruptcy Appellate Panel which, after reviewing those claims *de novo*, affirmed the Bankruptcy Court's decision and entered its own Memorandum and Judgment addressing each of those defenses and issues; and they have not informed this Court that the decisions of both the Bankruptcy Court and the Bankruptcy Appellate Panel were subsequently upheld by the Ninth Circuit Court of Appeals on the Petitioners' appeal to that Court. For that reason, Respondents believe Petitioners' statement of the Question Presented by their Petition mischaracterizes the issue before the Court.

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OPINIONS AND ORDERS BELOW

In addition to the Opinion of the Idaho Supreme Court (Pet., App. 1-29) the Order Denying Petitions for Rehearing (Pet., App. 43-44) and the Opinion and Order Re Motion for Summary Judgment of the trial court (Pet., App. 30-39) offered by the Petitioners, Respondents offer the Memorandum of Decision of the Bankruptcy Court (App., *infra*, 1-16), the Memorandum Decision of the Bankruptcy Appellate Panel (App., *infra*, 17-33) and the Bankruptcy Appellate Panel's Notice of Entry of Judgment (App., *infra*, 34-35).

REASONS FOR DENYING THE WRIT

The real question presented by the Petition is whether the Idaho Supreme Court erred when it ruled that findings of fact and conclusions of law and orders of dismissal entered by a Bankruptcy Court after a lengthy trial, and subsequently affirmed by a *de novo* judgment of the Bankruptcy Appellate Panel were *res judicata* as to the defenses litigated before the Bankruptcy Court when those same defenses were raised again before the trial court. The Petitioners have, by their decision to ignore or disregard important facts and the history of the case below which were part of the record before the trial court when it ruled that some of the issues raised by the Petitioners had already been decided by the Bankruptcy Court, and decided that under the doctrine of issue preclusion the Bankruptcy Court's decision was *res judicata* on those specific issues (Pet., App. at 36), misstated the decision of the Idaho Supreme Court they now seek to appeal and Petitioners base their Petition and their arguments to this

Court on a "straw man" ruling they have created rather than upon the actual ruling of the Idaho Supreme Court.

The Petitioners have not disclosed to this Court that they have previously appealed this same issue to the Bankruptcy Appellate Panel (which, after considering all of the Petitioners' arguments regarding *res judicata*, *de novo*, entered its own Memorandum decision, App., *infra*, 17, and Judgment, App., *infra*, 34) affirming the Bankruptcy Court's findings of fact and conclusions of law, nor have they disclosed to this Court that they subsequently appealed to the Ninth Circuit Court of Appeals which, in turn, affirmed the decision of the Bankruptcy Court and the Bankruptcy Appellate Panel.[2]

The Petitioners chose to end that first round of federal appeals with the adverse decision by the Ninth Circuit but now seek to have this Court review identical issues. The Respondents respectfully submit that the doctrines of "law-of-the-case" and judicial estoppel should bar the Petitioners from appealing these issues again after having previously prosecuted them to a dead end through the Bankruptcy Appellate Panel and the Ninth Circuit Court of Appeals.

Neither the Idaho Supreme Court's actual ruling, the ruling of the trial court affirmed by that court, the Bankruptcy Court's decision, the decisions of the Bankruptcy Appellate Panel or the decision of the Ninth Circuit Court

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[2] That decision of the Ninth Circuit (Docket Number 97-35855) was not made until after the trial court had entered its Opinion and Order Re Motion for Summary Judgment and the decision of the Ninth Circuit was not part of the record before the Idaho Supreme Court.

of Appeals affirming that decision, give rise to the question presented by the Petition. The decision of the Idaho Supreme Court, was made *de novo* on the basis of the history of the case and well settled Idaho case law, is narrowly limited to the facts of this case and can have none of the far reaching consequences the Petitioners so direly postulate. The Idaho Supreme Court's ruling was correct, proper and well reasoned in all respects and the Respondents respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

NEITHER THE RECORD NOR THE DECISION BELOW RAISE THE QUESTION PRESENTED BY THE PETITION

In the case below, the trial court entered its Opinion and Order Re Motion for Summary Judgment (Pet., App. at 30-39) after it had reviewed the Memorandum of Decision (App., *infra*, 1) which constituted the Bankruptcy Court's findings of fact and conclusions of law (App., *infra*, 16) and the Memorandum decision (App,. *infra*, 17) and Notice of Judgment (App., *infra* 34) of the Bankruptcy Appellate Panel. From its review of that record, the trial court was able to determine not just that the Neibaur bankruptcy petitions and the Elliotts' adversary claims against the Neibaurs had been dismissed by the orders of the Bankruptcy Court appended to the Petition (Pet., App. at 40-41), but that all of the Petitioners' defenses, except their arguments relating to the "one-action rule," had been fully and fairly litigated before, and decided by, the Bankruptcy Court (Pet., App., at 36-37) and that all of those defenses had been reviewed, *de novo*, by the Bankruptcy Appellate Panel before it entered its Memorandum

decision and Judgment affirming the decision of the Bankruptcy Court.

The Idaho Supreme Court, in turn, had that record, and the history of the case considered by the trial court, before it when it undertook its *de novo* review (Pet., App. at 20-21) of the evidence considered by the trial court to decide whether the trial court correctly applied the doctrine of *res judicata* (particularly including "issue preclusion") when it ruled that:

> " . . . issue preclusion applies in this instance, as the Neibaurs had a full and fair opportunity to litigate this issue before the Bankruptcy Court; the issue decided in the prior Bankruptcy proceeding was identical to the issue presently addressed by this court; the issue was decided by the Bankruptcy Court; the Bankruptcy Court issued a final judgment on the merits; and the Neibaurs were a party in the prior litigation. *See Anderson v. Pocatello*, 112 Idaho 176, 731 P.2d 171, 178-179 (1987) for a recitation of the elements of issue preclusion given by the Idaho Supreme Court. (Pet., App., at 36).

The Idaho Supreme Court's analysis of the question of whether the Memorandum Decision (findings of fact and conclusions of law) of the Bankruptcy Court, its orders, the Memorandum Decision of the Bankruptcy Appellate Panel and its Notice of Judgment, taken together, supported the trial court's conclusions that the Petitioners Neibaurs' defenses of statute and limitations, impossibility, impracticability and frustration of purpose had been fully litigated before the Bankruptcy Court.

The Idaho Supreme Court's conclusion that the doctrines of *res judicata*, collateral estoppel and issue

preclusion should bar Petitioners from litigating those defenses again in the Idaho District Court was based on a full and fair consideration of the record and facts of this case and the application of well settled Idaho law. The Idaho Supreme Court was fully cognizant of the Petitioners' argument that there was no final judgment in the Bankruptcy proceeding (Pet., App., at 20), and obviously considered that argument in concluding:

> According to the bankruptcy court's written decision, the court conducted an evidentiary hearing "that consumed several days to accommodate the testimony of the many witnesses. Hundreds of pages of documentary evidence was received." The bankruptcy court addressed the Neibaurs' contention "that the Elliotts' claim should be disallowed completely, arguing that the claim is barred by the applicable statutes of limitation" and the contention that "they are otherwise excused from paying the claim by case law doctrines of impossibility of performance, and impracticability or frustration of purpose." The bankruptcy court held that the Neibaurs were not excused from the performance of the agreements with the Elliotts under either theory. The bankruptcy court found that the Neibaurs were ineligible for the relief that they sought under Chapter 12. The Neibaurs sought to convert to a Chapter 11 proceeding, however, the bankruptcy court concluded "that conversion would be a useless gesture, not likely to result in confirmed plans." The bankruptcy court stated that the Neibaurs "appear to have made peace with most of their major creditors. However, their desire to continue the battle with the Elliotts leads this Court to conclude further reorganization efforts will by [sic] fruitless." The bankruptcy court then

> dismissed the Neibaurs' case. From the record, it appears that the proceeding before the bankruptcy court resulted in "a valid final judgment rendered on the merits by a court of competent jurisdiction" which should serve as a bar to a subsequent action between the parties upon the statute of limitation and equitable defenses claims. *Hindmarsh*, 138 Idaho at 94, 57 P.3d at 805. Accordingly, this Court upholds the district court's determination precluding a trial on the Neibaurs' arguments and defenses by operation of the doctrines of *res judicata* and collateral estoppel, based on their bankruptcy case. (Pet., App., at 21-22).

For a further discussion of the law in Idaho regarding elements of *res judicata*, collateral estoppel, issue preclusion, claim preclusion, see also *Anderson v. City of Pocatello*, 112 Idaho 176, 731 P.2d 171, 178-179 (1987) and *Hindmarsh v. Mock*, 138 Idaho 92, 57 P.3d 803 (2002).

Neither the trial court nor the Idaho Supreme Court considered the orders of the Bankruptcy Court in the kind of isolation the Petitioners would like this Court to. When the Idaho Supreme Court conducted its own *de novo* review of the question of whether the doctrines of *res judicata*/collateral estoppel/issue preclusion/claim preclusion should bar relitigation of the Petitioners' equitable defenses, it had before it the Bankruptcy Court's Memorandum Decision and the Bankruptcy Appellate Panel's decision and Notice of Entry of Judgment. Its holding was reasoned, and in light of the record before it, proper in all respects and does not call for a review by this Court.

While the Petitioners now argue that the proceedings in Bankruptcy Court did not result in a final judgment on any of the matters decided by that Court, it is interesting

to note that when they appealed that Court's decision to the Bankruptcy Appellate Panel they invoked the jurisdiction of that Court by arguing:

> " . . . The United States Bankruptcy Appellate Panel of the Ninth Circuit Court of Appeals has jurisdiction in this cause of action in accordance with Rule 8001 of the Unites States Bankruptcy Court Rules, which provides that a final Judgment of the United States Bankruptcy Court can be appealed to the Bankruptcy Appellate Panel of the Ninth Circuit Court or the United States District Court for the State of Idaho. In these particular cases the Judge issued an Order of Dismissal which was a final judgment." *Record of the Idaho Supreme Court*; R. Vol. 3, p. 500.

After the Bankruptcy Appellate Panel affirmed the Bankruptcy Court's decision in all respect on July 24, 1997 (*Record of Idaho Supreme Court*, R. Vol. 3, pp. 459-474) and entered its Notice of Entry of Judgment (*Record of The Idaho Supreme Court*, R. Vol. 3, pp. 475-476), the Petitioners Neibaurs appealed to the Ninth Circuit (Court of Appeals No. 97-35855) and again certified that the decision of the Bankruptcy Court was a final judgment, stating:

> "The United States Bankruptcy Appellate Panel of the Ninth Circuit Court of Appeals had jurisdiction in this cause of action in accordance with Rule 8001 of the United States Bankruptcy Court Rules, which provides that a final judgment of the United States Bankruptcy Court can be appealed to the Bankruptcy Appellate Panel or to the United States District Court for the State of Idaho. The Bankruptcy Appellate Panel also had jurisdiction pursuant to 28 U.S.C.S. §158(b)(1).

> The Honorable Jim D. Pappas, United States Bankruptcy Judge for the District of Idaho, issued an Order of Dismissal in the case of Darwin P. Neibaur and in the case of June G. Neibaur which was a final judgment, and the Bankruptcy Appellate Panel affirmed the lower court's decision. The Ninth Circuit Court of Appeals has jurisdiction pursuant to U.S.C.S. §158(d)." *Record of the Idaho Supreme Court*, Vol. 3, p. 547.

The Petitioners now argue that the decision and orders of the Bankruptcy Court they formerly claimed amounted to a final judgment did not, in fact, constitute a final judgment, because provisions of 11 U.S.C. §349 are inconsistent with that conclusion. Respondents believe Petitioners' argument is without merit; the decision and orders of the Bankruptcy Court did restore Petitioners to the position they were in before they filed for Bankruptcy; they were free to seek Chapter 11 or Chapter 7 bankruptcy protection; their property was vested in them again as it was vested immediately before they commenced their Chapter 12 bankruptcies; no transfers had taken place; no liens had come into existence during their bankruptcies and they were, in all respects but one, in the same position they had been in before the Bankruptcy Court entered its Memorandum decision and orders. Because Petitioners chose to litigate their statute of limitations and equitable defenses before that Court, they were bound by its findings of fact and conclusions of law with respect to those defenses. They could have filed new bankruptcy petitions, or converted their bankruptcies, but had they done so they could not have expected to be allowed to waste the Bankruptcy Court's time and resources relitigating those same defenses. The Idaho Supreme Court, relying in part on rulings of this Court, has articulated the reasons and

policies behind the doctrines of *res judicata* and collateral estoppel:

> Collateral estoppel serves the purposes "of protecting litigants from the burden of relitigating an identical issue with the same party or his privy[,] of promoting judicial economy by preventing needless litigation," *Parklane Hosiery, supra*, 439 U.S. at 326, 99 S.Ct. at 649; see also *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328-29, 91 S.Ct. 1434, 1442-43, 28 L.Ed.2d 788 (1971), of preventing inconsistent decisions, and of encouraging reliance on adjudications. *Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308 (1980). To permit relitigation of an issue that was fully and fairly litigated and lost in a prior action undermines the worthwhile purposes of the collateral estoppel rule without serving any other recognizable good purpose.
>
> * * *
>
> The more appropriate test for whether collateral estoppel should apply includes the following: (1) Did the party "against whom the earlier decision is asserted . . . have a 'full and fair opportunity to litigate that issue in the earlier case.'" *Allen, supra*, 449 U.S. at 95, 101 S.Ct. at 415, citing *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed.2d 210 (1979) and *Blonder-Tongue, supra*, 402 U.S. at 328-29, 91 S.Ct. at 1442-43. (2) Was the issue decided in the prior litigation "identical with the one presented in the action in question?" *Bernhard, supra*, 122 P.2d at 895, quoted in *Blonder-Tongue, supra*, 402 U.S. at 323, 91 S.Ct. at 1440. (3) Was the issue actually decided in the prior litigation? This may be dependent on whether deciding the issue was

> "necessary to [the prior] judgment." *Allen*, *supra*, 449 U.S. at 94, 101 S.Ct. at 414; citing *Montana*, *supra*, 440 U.S. at 153, 99 S.Ct. at 973; *Rajspic v. Nationwide Mutual Insurance Co.*, 104 Idaho 662, 665, 662 P.2d 534, 537 (1983); *Pocatello Industrial Park v. Steel West, Inc.*, 101 Idaho 783, 786, 621 P.2d 399, 402 (1980) ("In order for the doctrine of collateral estoppel to apply, the issue in question must have actually been litigated and resolved in the prior suit." (Emphasis in original; citations omitted.)). (4) "Was there a final judgment on the merits?" *Bernhard*, *supra*, 122 P.2d at 895; quoted in *Blonder-Tongue*, *supra*, 402 U.S. at 323, 91 S.Ct. at 1440. (5) "Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?" *Bernhard*, *supra*, 122 P.2d at 895, quoted in *Blonder-Tongue*, *supra*, 402 U.S. at 323-24, 91 S.Ct. at 1440. *Id* at 183. *Anderson v. City of Pocatello*, 112 Idaho 176, 183-184, 731 P.2d 171, 174-176, 178-179 (1987).

Applying that reasoning to the facts of this case makes it evident why the Idaho Supreme Court ruled as it did in this case and clear that justice was done when it did so. The Petitioners' argument that the workings of 11 U.S.C. §349 would be undermined or destroyed if this ruling is allowed to stand completely ignores the facts and the history of this case and is postulated on hypothetical scenarios which Respondents believe cannot reasonably follow from any reasonable construction of the ruling Petitioners seek to appeal.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE BARRED BY APPLICATION OF THE DOCTRINES OF JUDICIAL ESTOPPEL AND LAW OF THE CASE

As noted above, the Petitioners have previously taken the position that the orders of the Bankruptcy Court were a final judgment subject to appeal, first to the Bankruptcy Appellate Panel, then to the Ninth Circuit Court of Appeals. The doctrine of judicial estoppel should operate to prevent them from asserting a contrary position in this appeal. The doctrine of judicial estoppel may be invoked to protect the integrity of the legal process by preventing litigants from deliberately changing legal positions to gain some advantage as Petitioners now do in this case. *New Hampshire v. Maine*, 532 U.S. 742, 749-751, 121 S.Ct. 1808, 1814-1816, 149 L.Ed.2d 968, 976-977 (2001). *McKay v. Owens*, 130 Idaho 148, 152, 937 P.2d 1222, 1226 (1997).

The doctrine of "law-of-the-case" should also apply here and should operate independently to prevent the Petitioners from proceeding with their appeal to this Court. As noted above too, the Petitioners have previously appealed exactly the issues raised by this Petition to a Bankruptcy Appellate Panel and the Ninth Circuit Court of Appeals. After the Bankruptcy Court's decision was affirmed by both of those appellate courts, the Petitioners elected not to appeal to this Court and resumed their defense in the Idaho state court. They now seek further appellate review of issues already decided on former federal appeals. The primary purpose of the "law-of-the-case" doctrine is judicial economy and the doctrine is intended to prevent the very thing the Petitioners now seek to do. While the doctrine of "law-of-the-case" is not inflexible, Respondents submit this is a case where it is

both reasonable and proper to apply the doctrine. The Petitioners have had the claims they raise by their Petition heard and rejected by the Idaho trial court, the Bankruptcy Court, the Bankruptcy Appellate Panel, the Ninth Circuit Court of Appeals and the Idaho Supreme Court. Considerations of judicial economy should bar the Petitioners from seeking further appellate review of the issues presented by this Petition. For a discussion of the doctrine of "law-of-the-case" see *Sanchez v. Galey*, 115 Idaho 1064, 1074-1075, 772 P.2d 702, 712-713, (1978); *Searle v. Allstate Life Ins. Co.*, 38 Cal. 3rd 425, 212 Cal. Rptr. 466, 696 P.2d 1308 (1985).

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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Attorney for Respondents

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

IN RE DARWIN P. NEIBAUR, **Debtor.**	)	**Case No. 95-00205**
IN RE JUNE G. NEIBAUR, **Debtor**	)	**Case No. 95-00209** **MEMORANDUM OF DECISION** (Filed Aug. 7, 1996)

Brent T. Robinson, LING, NIELSEN AND ROBINSON, Rupert, Idaho, for Debtors.

Charles J. Nicholas, Boise, Idaho, for Creditors Edward G. Elliott and Mary L. Elliott.

Forrest Hymas, Jerome, Idaho, Chapter 12 Trustee.

Introduction

These are related Chapter 12 cases prosecuted by former spouses jointly. Before the Court for disposition are a variety of matters including confirmation of Debtors' Joint Amended Chapter 12 plans, Debtors' objections to the claim of Creditors Edward and Mary Elliott, and, the motions to dismiss or convert the cases filed by the Elliotts.

Other than the issues concerning the Elliotts, Debtors have been able to negotiate or resolve the other objections to their proposed plan. A consolidated evidentiary hearing was conducted by the Court concerning the Elliott matters

that consumed several days to accommodate the testimony of the many witnesses. Hundreds of pages of documentary evidence was received. While the issues raised by the parties are wide-ranging and numerous, upon further review of this record, the Court has determined that neither Debtor is eligible for Chapter 12 relief, and that the cases should be dismissed. Therefore, much of what has been advanced by the parties need not be addressed by the Court.

Facts.

In 1982, Debtors, then married, together with other individuals, purchased an existing John Deere farm implement dealership, and the land on which it operated, from the Elliotts. Debtors and their associates formed a general partnership to purchase the land, with $1,100,000 of the price financed by the Elliotts under a note secured by the property. The group formed a corporation to buy the business assets, giving the Elliotts a note for $1,025,000 secured by those assets, and by the personal guarantees of the principals of the company, including Debtors. Debtors granted the Elliotts mortgages on some of their farm properties as additional security for the loans, as did some of the other principals in the venture.

The parties generally understood that the income from the operation of the business, and the company's payment of rent to the corporation, would provide the source for making the monthly installment payments to the Elliotts. The Elliotts did not, however, guarantee or represent that the dealership would be profitable. As time passed after the transaction, economic conditions in America in general, and the agricultural economy in

particular, deteriorated. Interest rates and farm operating costs escalated over what was already high levels, and farm commodity prices were at times very low. Over the next several years, sales of new farm machinery dipped dramatically, and the market for sale of farm equipment became hyper-competitive. As this Court especially appreciates, many farm implement dealerships failed, along with the farming operations upon which they relied, and all agri-business concerns were challenged to survive.

Partially as a result of the difficult economic times, the partnership and corporation became seriously delinquent on the Elliott notes. This predicament continued in spite of general improvement in the economy starting in about 1987. The parties executed a series of modifications to the contracts. Finally, in 1991, in order to stave off the Elliotts' threats of foreclosure, the parties, including Debtors (who had divorced in 1986), negotiated another modification of the terms of their original agreements. In that modification, the Elliotts agreed to reduce the balance of one of the notes, and the parties agreed to the amounts due and to a modified payment schedule.

Unfortunately, the modifications to the notes did not solve the problem, and in 1993 the Elliotts sued the dealership, the partnership, Debtors and the other principals to collect the notes and foreclose the various mortgages and liens securing the debts. Again the parties negotiated. As a result, it was agreed that the land and business would be sold to a third party for cash, the proceeds used to retire debt, including a significant payment to the Elliotts, and that the venture's principals would pay off the balance of the Elliott notes over time. Other principals in the enterprise made payments to the Elliotts. Debtors did not.

Status of the Proceedings.

Debtors filed for Chapter 12 relief on January 27, 1995, on the eve of trial in the state court foreclosure litigation. Debtors' bankruptcy schedules and the record in this case indicate that in addition to the obligation which the Court now decrees they owe the Elliotts, Debtors have in excess of $1,000,000 in other debt.[1] As near as the Court can determine from the record and the representations of Debtors' counsel in Court and in briefing, Debtors have been generally successful in resolving the objections made by other creditors to their proposed reorganization plans.[2] The Chapter 12 trustee has reserved his recommendation as to whether the plans should be confirmed pending the outcome of the dispute with the Elliotts.

While the Court repeatedly encouraged Debtors and the Elliotts to explore the benefits of a consensual plan, the Elliotts' objections remain unresolved. No settlement was reached. Debtors' plans, and their objection to the Elliotts' claim, contend that Debtors are excused from paying the Elliotts any further amounts. However, for the reasons set forth below, the Court has determined that

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[1] There have been approximately $1,300,000 in claims filed by creditors in each of the Chapter 12 cases other than the Elliott claim. As is usually the case, several debts are listed in Debtors' schedules for which no proofs of claim have been filed. Calculating the total amount owed by Debtors on the date of the bankruptcy filings is therefore an imprecise process.

[2] There does appear to be an outstanding unresolved objection to the Debtors' Joint Amended Plan filed by the Internal Revenue Service, whom Debtors acknowledge they owe about $122,000 in back taxes incurred by Debtors as a result of nonagricultural investment scheme. Given the Court's ruling on the Elliotts' objections, however, there is no need to address the Government's concerns.

Debtors' position is wrong. Consequently, when the Elliotts' claims are totaled along with Debtors' other obligations, Debtors owe significantly more than Congress has allowed to be restructured under Chapter 12. Moreover, given the impasse between these warring parties, the Court is not inclined to allow Debtors to convert to a Chapter 11 case, and dismissal of the bankruptcy cases is in order.

Discussion and Disposition of the Issues.

Congress, itself responding to the challenges presented by the anemic farm economy in the 1980s, added Chapter 12 to the Bankruptcy Code to allow family farmers a specially tailored means of reorganizing their financial affairs. However, eligibility for this relief, as opposed to that provided in Chapter 11 to all businesses, was restricted. Among other conditions, a debtor can access Chapter 12 only if its aggregate debt does not exceed $1.5 million, 80% of which must arise out of a farming operation owned and operated by the debtor. 11 U.S.C. § 101(18)(A). If Debtors owe the Elliotts what the creditors claim, that indebtedness, together with Debtors' other non-farm debt (principally the tax claim) make it impossible to satisfy the statutory limits for Chapter 12 eligibility.

Debtors dispute the accuracy of the amount of the Elliotts' claim. In addition, Debtors ask that the Elliotts' claim be disallowed completely, arguing that the claim is barred by applicable statutes of limitation. Debtors alternatively contend they are otherwise excused from paying the claim by the case law doctrines of impossibility of performance, and impracticality or frustration of purpose. The Court will address this last argument first.

Impossibility of Performance.

Debtors assert that the contracts they entered into with the Elliotts in 1982 were founded upon the assumption that general farm market and economic conditions would allow them to generate sufficient income through the implement dealership to pay the Elliotts the financed purchase price. They contend they were prevented from doing so through no fault of their own.

In support of their argument, Debtors present the expert testimony of Dr. Gilbert Miller, a farm economist and consultant. His account of the events of the 1980's is revealing. He suggests that changes in national economic policies, both monetary and fiscal, in the late 70's and early 80's caused a severe downturn in the farm economy, the likes of which had not been experienced in America since the Depression. His thoughtful presentation documents how interest rates for farm credit increased dramatically, while the value of the dollar declined internationally; how changes in monetary policies and tax laws led to a huge federal budget deficit; how the resulting weak farm export market combined with domestic problems caused a sharp drop in farm product market prices, and; how this combination of higher operating costs and less income had extremely adverse effects on our Nation's farmers and those businesses that depended upon farming. As a result, sales of new farm implements dropped markedly. Both nationally and locally, new equipment sales income declined to levels unprecedented in recent

times. This situation continued in the farm economy through 1987, when conditions began to improve.[3]

Debtors offer other testimony to support the notion that the implement dealership in which they invested suffered a particularly severe downturn. In particular, the tough times resulted in changes in local competition, from both independents and other dealers, which severely hampered sales.[4]

The Elliotts suggest that while adverse conditions in the economy had some effect, such was not the sole, nor even the primary reason for Debtors' company's inability to pay the Elliotts' notes. They feel Debtors assumed the risk of a change in economic conditions when they signed the notes, and that their agreement should be honored.

Under applicable Idaho case law, the doctrine of impossibility of performance may operate to excuse performance of

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[3] Dr. Miller offered his opinion that based upon his review of these macro-economic conditions, it would have been impossible for Debtors' farm implement dealership to operate profitably from about 1984-1987. The Court discounts the reliability of this opinion. Dr. Miller admitted he had no personal knowledge of any of the particular facts and circumstances of this dealership's operation; that he did not review its books, records or other evidence of how it operated; and that he did not do a "micro" analysis of the same economic factors for the Cassia/Minidoka county farm economy. Rather, the witness' testimony is helpful only as to general economic conditions existing at the time.

[4] Mr. Couch, who was an independent farm equipment dealer during the time in question, also testified for Debtors. However, it was apparent to the Court that Mr. Couch, because of the methods of operation he adopted, did quite well during the economic downturn.

a contract when the bargained-for performance is no longer capable of being performed due to the unforeseen, supervening act of a third party. *Haessley v. Safeco Title Ins. Co.*, 121 Idaho 463, 465, 825 P.2d 1119, 1121 (1992). The *sine qua non* for application of the doctrine is that the parties must have contracted, expressly or in necessary contemplation, with reference to continued existence of the specific thing as a condition essential to performance. *Twin Harbors Lumber Co. v. Carrico*, 92 Idaho 343, 348-49, 442 P.2d 753, 758-59 (1968). To prove up this defense (1) a contingency must occur; (2) performance must be impossible, not just more difficult or more expensive, and; (3) the nonoccurrence of the contingency must be a basis assumption of the agreement. *Haessly*, 121 Idaho at 465. *See also*, *Sutheimer v. Stoltenberg*, 127 Idaho 81, 85, 896 P.2d 989, 993 (1995).

Impracticality of performance or frustration of purpose, a doctrine similar in its essential elements, merely suspends the obligor's duty to perform while the contingency exists. *Sutheimer*, 127 Idaho at 85, 896 P.2d at 993, quoting from Section 269 of the Restatement (Second) of Contracts. The events constituting a contract impractical or frustrating its purpose must occur "without fault" as to the party offering the excuse. Restatement, §§ 281, 285, 286. A version of the doctrine of impracticality with limited applicability concerning the delivery of goods has been incorporated in the Idaho Uniform Commercial Code, Idaho Code § 28-2-615. In commenting upon the application of that statute, the Idaho courts give general guidance as to the context for application of these common law doctrines in a broader commercial context:

> Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen

> contingency which alters the essential nature of the performance. Neither is the rise or a collapse in the market itself a justification, for that is exactly the type of business risk which business contracts made [sic] a fixed prices are intended to cover. . . .

Lawrance v. Elmore Bean Warehouse, Inc., 108 Idaho 892, 894, 702 P.2d 930, 932 (Ct.App. 1985), quoting Comment 4 to Idaho Code § 28-2-615. The court goes on to note that virtually all contracts with fixed price terms could be subject to modification based on these doctrines upon significant changes in market factors, inviting countless suits by speculators as well as by persons merely disappointed in their bargains. *Id.*

The party asserting impossibility/impracticality of performance or frustration of purpose has the burden of proving the necessary facts for application of the doctrines. *Lawrence*, 108 Idaho at 894, 702 P.2d at 932. After considering these authorities, and even assuming the economic conditions were as presented by Debtors in their proof to the Court, for several reasons the Court concludes Debtors are not excused from performance of their contracts with the Elliotts by impossibility, impracticality or frustration of purpose.

First, of all, the Court notes that Debtors' own expert establishes that adverse economic changes were well underway by the time the contracts between Debtors and the Elliotts were negotiated. Dr. Miller explains that the prime interest rate had already reached 20 percent by mid-1981; significant changes in monetary policy had commenced, evidenced by a decline in gross domestic product, and; the Economic Tax Recovery Act was passed in 1981, cutting taxes, resulting in an immediate increase

in the federal deficit. Banks and other lenders, including local institutions, had already begun tightening their credit policies and stiffening their loan requirements by 1982. All of these factors and many others show that the changes in economic conditions upon which Debtors rely to justify excusing their performance to the Elliotts were indeed in process at the time the parties entered their agreement.

Moreover, the farm economy in particular, as this Court has repeatedly observed over the years, is by nature predictably unpredictable. That is, due to the extent of the influence of external factors on agribusiness, a crisis, possibly of substantial duration, is perhaps only the next growing season away. In other words, even if the parties did expect the income from the implement business to be sufficient to make the contract payments, the Court can not conclude it was unforeseeable that the economy would markedly deteriorate before the long-term contract balance was to be paid. Perhaps the best evidence of the skepticism of the parties is the fact that the Elliotts insisted on guarantees and additional collateral to secure payment, to which Debtors agreed.

The Court also can not conclude that the dealership's inability to make the payments due to the Elliotts was occasioned solely as a result of the poor business climate. Through their evidence, the Elliotts showed the Court that the implement dealership was likely under-capitalized and took on more debt that it could expect to service; that is suffered from problems with management, losing key employees at critical times; relations with John Deere were at times strained; and, that the company's principals were frequently at odds over important issues. Each of

these factors likely contributed in some degree to the failure to make the Elliott payments.

Debtors' excuse is also conspicuous in its failure to acknowledge that they renegotiated the Elliott contract, either individually or through their agents, after economic conditions began to improve. If Debtors were excused from paying the Elliotts, the Court concludes that such defense was contracted away when they agreed with the Elliotts to the 1991 modification in consideration of the Elliotts' agreement to defer foreclosure.

Conditions were indeed difficult for those in farming in the 1980's; Chapter 12 is the progeny of those adverse conditions. Debtors' farm machinery business was hard-hit by the soft economy. However, such a business is by its nature fraught with risk, and if Debtors were to prevail in this defense, few debts incurred in the industry during these years would be collectible. The Court is not inclined to grant the moratorium Debtors presume to sponsor, and the Court concludes that the Elliotts' notes are valid.

Statute of Limitations.

Through a convoluted argument, Debtors argue that the Elliotts' claim against them under the promissory note are time barred under applicable statutes of limitation, ostensibly based upon the law as explained in this Court's decision in *In re Ogle*, 95 I.B.C.R. 275.[5] Debtors' argument lacks merit.

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[5] To be clear, the Court observes that its decision in *Ogle* is currently the subject of a timely appeal to the U.S. District Court, and

(Continued on following page)

In *Ogle*, in 1981 the debtors executed a promissory note calling for annual payments, secured by a mortgage, in favor of a creditor. The debtors made one payment in 1982, and the note was modified in 1983. The debtors made no further payments on the note, the creditor took no action to foreclose the mortgage or collect the note, and in 1995 debtors filed for bankruptcy. When the debtors objected to the creditor's claim, the Court held that the mortgage and the underlying note obligation were unenforceable. 95 I.B.C.R. at 276-279.

Here, once again, Debtors' argument conveniently disregards the implications of the formal modifications to their contracts with the Elliotts occurring in 1991. At that time, accommodations for any existing defaults were made by the parties, and Debtors acknowledged the continuing vitality of their debt to the Elliotts in the modification agreement. Whatever the status of the notes at that date, any limitations defense to the debts were bargained away by Debtors as a part of the modification.

Amount of Elliotts' Claim.

Debtors assert that the Elliotts' accounting of transactions on the notes fail to give proper credit for payments made, and are otherwise inaccurate. They contend that the Elliotts "manipulated" the application of payments so as to preserve their rights under the contracts to continue a mortgage against Debtors' property. Both parties submitted proof on this issue. The Court notes that the

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therefore is not final. Consequently, the decision does not serve as precedent in this District.

evidence is conflicting, and there is room for disagreement over the precise application of all payments made from the various obligers on the notes, especially considering the length of time and the number of payments involved. Though disputed, the Court accepts as true the accounting of the indebtedness offered by the Elliotts at the hearing through the testimony of the officers and business records of the escrow company, as the correct amount of the balances due on the debt for purposes of the bankruptcy proceedings only. The Court does not see any evidence of intentional manipulation of payments to the prejudice of Debtors, all payments having been applied according to the agreements of the parties. Accordingly, while Debtors may raise their contentions anew in any state court litigation, for present purposes, the Court is satisfied that the balance due to the Elliotts on both notes, after appropriate credits, is $687,388.26.[6]

When the amount owed the Elliotts is included with Debtors' other indebtedness, the Court must conclude that Debtors, on the date they filed for Chapter 12 relief, owed more than $1.5 million in aggregate debt. Additionally, neither the Elliott debt nor the tax obligation to the I.R.S. arose from a farming operation. Debtors also are ineligible for relief because less than 80/% of their debt arose from a farming operation.[7]

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[6] See Elliotts' Post-trial Memorandum, p. 5.

[7] Debtors argue that even if the debt to the Elliotts is not excused, it should not be counted in the "80% analysis" because it is "contingent." Debtors' obligation to the Elliotts is not contingent as that term is used in Section 101(18)(A), however, because their liability to the

(Continued on following page)

Conversion or Dismi[illegible]al.

Technically, though they are ineligible for Chapter 12 relief, Debtors could ask to convert to Chapter 11, again offer their plans, and again present many of the same issues raised concerning confirmation. However, for several reasons the Court concludes that conversion would be a useless gesture, not likely to result in confirmed plans.

In Chapter 11, creditors, by class, are entitled to vote for or against a plan. 11 U.S.C. § 1126(a). The Elliotts, who would hold the bulk of the unsecured debt, would likely oppose Debtors' reorganization effort, and thereby control the outcome of voting by the unsecured creditor class. 11 U.S.C. § 1126(c). Debtors' plans could only be "crammed down" over the Elliotts' negative vote by compliance with the Bankruptcy Code's "absolute priority rule." 11 U.S.C. § 1129(b)(2)(B). Because Debtors proposed to retain, rather than liquidate, their assets, they would have to propose to pay unsecured creditors in full. Given the amount of debt and Debtors' circumstances, the prospects of doing so seem remote.

Moreover, the Elliotts have raised a variety of arguments in the Chapter 12 cases suggesting that Debtors lack good faith in pursuing reorganization. The Court makes no final conclusions as to this argument here because Debtors are not eligible for relief. However, there is considerable evidence in the record showing that Debtors systematically transferred away many of their most

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Elliotts is subject to ready determination. *See, e.g., In re Nicholes*, 184 B.R. 82 (9th Cir. B.A.P. 1995).

valuable properties shortly after falling into default on the Elliotts' notes. Debtors also own and control valuable farm land in Washington in their daughters' name without, in the Court's opinion, adequate justification for such. Debtor Darwin Neibaur has over $106,000 in a cash IRA account which he claims as exempt, even though at his advanced age and in his strained financial condition he has not sought to access. The Court doubts the *bona fides* of the exemption claim. Finally, Debtors have been less than generous in the valuations assigned to their interest in Darwin Neibaur Farms, the family partnership. Valuation evidence was offered by both sides concerning this entity. Unless the partnership is willing to liquidate and pay out its equity to the partners, the Court would be extremely reluctant to accept Debtors' values absent full payment to their creditors.

Debtors appear to have made peace with most of their major creditors. However, their desire to continue the battle with the Elliotts leads the Court to conclude further reorganization efforts will be fruitless.[8] Without making final determinations on any of the above factors discussed above, the Court is sufficiently convinced that Debtors would be unsuccessful in proceedings under Chapter 11,

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[8] Debtors remind the Court that while the original notes to the Elliotts totaled just over $2 million, that the Elliotts have received over $3 million in payments already, much of which has been applied to accrued interest and costs. Debtors are more impressed with this fact than the Court. Since even the wage-earner will eventually pay about three times the deferred balance over the thirty-year term of a simple home mortgage, Debtors should not be shocked with the total amount payed to the Elliotts. The remedy for this alleged injustice would simply require early payment of the balance due on the notes.

and concludes that good cause exists to dismiss these bankruptcy cases. 11 U.S.C. §§ 1208(c)(1), (5), (9).

Conclusion

Neither Darwin nor June Neibaur are eligible for Chapter 12 relief. Under the circumstances, the bankruptcy cases should be dismissed.[9] For these reasons, the Court will be [sic] separate order overrule Debtors' objection to the Elliotts' proof of claim, deny confirmation of Debtors' proposed Joint Amended Chapter 12 Plan and grant the Elliotts' motion to dismiss This Memorandum constitutes the Court's findings of fact and conclusions of law. F.R.B.P. 7052.

DATED this 7th day of August, 1996.

/s/ Jim D. Pappas
JIM D. PAPPAS
CHIEF U.S. BANKRUPTCY
JUDGE

[9] The Court would reconsider dismissal if Debtors indicate a desire to convert to Chapter 7 within ten (10) days of the day hereof.

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re JUNE G. NEIBAUR, Debtor.	BAP No. ID-96-1842-RoJRy BAP No. ID-96-1843-RoJRy (consolidated) BK No. 95-00209 Adv. No. 95-6073
In re DARWIN P. NEIBAUR, Debtor.	BK No. 95-00205 Adv. No. 95-6074
DARWIN P. NEIBAUR and JUNE G. NEIBAUR, Appellants, vs. EDWARD G. ELLIOTT and MARY L. ELLIOTT, husband and wife, Appellees.	**MEMORANDUM**[1]

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except when relevant under the doctrines of law of the case, res judicata or collateral estoppel. *See* BAP Rule 13 and Circuit Rule 36-3.

Argued and Submitted on June 25, 1997
at Boise, Idaho

Filed – JUL 24 1997

Appeal from the United States Bankruptcy Court
for the District of Idaho

Honorable Jim D. Pappas,
Chief Bankruptcy Judge, Presiding

Before: ROBLES[2], JONES and RYAN, Bankruptcy Judges.

This is a consolidated appeal from two related bankruptcy cases. The appeal arises from the bankruptcy court's order (1) overruling the debtors' objection to claim, (2) dismissing the debtors' joint amended Chapter 12 plan and (3) granting the motion to dismiss the Chapter 12 cases. The debtors timely filed their notices of appeal. Although the debtors violated Federal Rules of Bankruptcy Procedure 8006[3] by failing to file their respective designation of issues and records on appeal within ten days of the notices of appeal, the record is now complete for review by this Panel, and the severe sanction of dismissing the appeal is not warranted. *In re Fitzsimmons*, 920 F.2d 1468 (9th Cir. 1990) (holding that unless there are egregious circumstances, the court as a general rule should consider alternative sanctions before dismissing the appeal).

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[2] Honorable Ernest M. Robles, Bankruptcy Judge for the Central District of California, sitting by designation.

[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

FACTS

June G. Neibaur and Darwin P. Neibaur (collectively "Appellants") filed separate Chapter 12 petitions on January 27, 1995. Although currently divorced, all relevant facts occurred during the time of their marriage.

On October 15, 1982, the Appellants and others, John and Patricia Hansen (collectively "Hansens") and Edward and Zina Heiner (collectively "Heiners"), formed an Idaho corporation known as Green Line Sales, Inc. to purchase an existing John Deere farm implement dealership from Edward and Mary Elliott (collectively "Appellees"). Green Lines Sales, Inc. ("Green Line") executed a promissory note in the amount of $1,025,000 in favor of the Appellees, guaranteed by the individual shareholders, including the Appellants, and the assets of Green Line. The promissory note was further secured by mortgages in favor of the Appellees on properties owned by the Hansens and the Appellants. The mortgages specifically state that "*in the event of a foreclosure sale*" the Appellees will sell the Hansen property before the Appellants' property.

At the same time as the Green Line promissory note, the Appellants, Hansens and Heiners formed a limited partnership to purchase the real property upon which the dealership is located. The partnership gave the Appellees a promissory note for $1,100,000, secured by a mortgage on the property being purchased. The parties generally understood that the income generated by the dealership would provide the source for making the monthly installment payments to the Appellees.

Green Line and the partnership became delinquent in paying on the promissory notes due to the severe downturn in sales as a result of the general depression in the

farm economy during the 1980s. On September 30, 1991, the parties, including the Appellants, entered into a modification agreement. Appellants and the other borrowers reaffirmed their obligations under the promissory notes, including the delinquent interest rates, in consideration of a $700,000.00 reduction in the principal under the Green Line promissory note and other modifications. Green Line and the partnership once again defaulted on the September 30, 1991 modification agreement.

The Appellees filed suit in state court on August 10, 1993 to foreclose on the securities given under the two promissory notes and to enforce the personal guarantees of the partners and the shareholders. By a stipulated agreement approved by the state court on March 11, 1994, a third party purchased the dealership and the land for cash, with the proceeds being used to retire some of the debt. Subsequently, the Appellees and the Hansens entered into a settlement agreement, approved by the state court judge, under which the Appellees agreed to settle their claims against the Hansens for $750,000. As part of that settlement agreement, the Hansens pledged to the Appellees $150,000 in lieu of foreclosing on the mortgage given as additional security for the Green Line promissory note. Thereafter, the state court dismissed the Appellees' claim against the Hansens with prejudice.

While the Hansens settled with the Appellees, the Appellants filed for bankruptcy and brought separate objections to the Appellees' proofs of claim. The Appellants filed a joint amended Chapter 12 plan, and the Appellees countered with motions to dismiss both Appellants' Chapter 12 bankruptcy cases. On August 8, 1996, following an evidentiary hearing that lasted for seven days, the trial

court issued a Memorandum of Decision and an accompanying Order (1) overruling the Appellants' objections to the Appellees' proofs of claim, (2) denying confirmation of the Appellants' Joint Amended Chapter 12 Plan, and (3) granting the Appellees' Motion to Dismiss the bankruptcy cases. The Appellants appeal from the order of the trial court.

The trial court found that when the Appellees' claims are totaled with the Appellants' other debts, they owe significantly more than Congress has allowed to be restructured under Chapter 12.[4] The trial court also concluded that conversion of Appellants' bankruptcy cases to Chapter 11 would be futile because the Appellees would vote against a plan under that chapter as well.

The issues on appeal only deal with the trial court's order overruling the Appellants' objection to claim and the classification of the tax obligation owed to the Internal Revenue Service ("IRS") for the year 1976. However, as explained above, the orders denying confirmation and dismissing the cases are based on the trial court's decision overruling the objections to claim. For the reasons set forth below, we **AFFIRM**.

ISSUES ON APPEAL

1. Whether the Appellees' claim is barred by Idaho's "one action rule."

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[4] To qualify as a "family farmer" eligible to file under Chapter 12, the aggregate debts of the debtor may not exceed $1,500,000 and not less than 80% of non-contingent, liquidated debts must arise out of a farm operation. 11 U.S.C. § 101(18).

2. Whether the Appellees' claim is barred as a result of impossibility, impracticability and/or frustration of purpose.

3. Whether the tax obligation owed to the IRS for the tax year 1976 is a non-farm operation.

STANDARDS OF REVIEW

The Bankruptcy Appellate Panel reviews a bankruptcy court's findings of fact under the clearly erroneous standard. *In re Tully*, 202 B.R. 481, 483 (9th Cir. BAP 1996). Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. *In re Pena*, 207 B.R. 919, 920 (9th Cir. BAP 1997) (citing *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985)).

The bankruptcy court's conclusions of law are reviewed *de novo*. *Tully*, 202 B.R. at 483 (citing *In re United States Trustee*, 32 F.3d 1370, 1372 (9th Cir. 1994)). Whether an activity constitutes a farm operation is an issue at law, which the Panel reviews *de novo*. *In re Watford*, 898 F.2d 1525, 1527 (11th Cir. 1990).[5]

Whether the doctrines of impossibility, impracticability and/or frustration of purpose are applicable in a given case is a mixed issue of law and fact, which the Panel reviews *de novo*. *Waegemann v. Montgomery Ward & Co., Inc.*, 713 F.2d 452, 453 (9th Cir. 1983); *City of Boise v. Bench Sewer Dist.*, 116 Idaho 25, 29 (1989) (defining Idaho

[5] There are currently no published Ninth Circuit or BAP opinions on what constitutes a farm operation.

contract law, which is applicable here). A mixed question of law and fact arises when the historical facts are established, the rule of law is undisputed, and the issue is whether the facts satisfy the legal rule. *In re Canino*, 185 B.R. 584, 589-90 (9th Cir. BAP 1995).

DISCUSSION

1. Whether the Appellees' Claim is Barred by Idaho's One Action Rule.

Upon review of excerpts on appeal and following oral arguments, we conclude that the "one action issue" has not been properly raised on appeal. The Bankruptcy Appellate Panel may only review matters that were properly raised and decided by the bankruptcy court. *In re Greenfield Drive Storage Park*, 207 B.R. 913, 918 (9th Cir. BAP 1997). Issues that are raised for the first time on appeal will not be considered. *In re NSB Film Corp.*, 167 B.R. 176, 180 (9th Cir. BAP 1994).

Here, the Appellants first raised the "one action rule" issue at the post-trial closing argument.[6] The Appellants contend that they raised the *factual basis* for the "one action rule" argument in the [sic] their objections to claim and the Amended Schedule "F". The only conclusions that can be reached from reviewing these documents are that the Appellants object to the Appellees' claim and that such

[6] The Excerpt of Record on Appeal does not contain a transcript or certified copy of the closing argument. The Appellants have attached a copy of the closing argument to their brief. The copy of the closing argument is not filed stamped as having been received by the bankruptcy court.

claim should have a value of $0. The Appellants did not raise this issue to the trial court, and that court did not rule on the issue. Based on the trial court's Memorandum of Decision, it appears that the parties argued and the court below decided whether the Appellees' claim is barred by the statute of limitation, a related but completely different issue. Merely claiming that certain documents raise the factual basis for an argument without actually making such an argument before the trial court is insufficient.

During oral argument, counsel for the Appellants stated that the "one action rule" argument was raised during an in-chambers meeting with the trial judge. Appellees' counsel disputed this assertion and stated that the trial court merely took note of the fact that title to the property had been transferred to a new entity related to the Appellants shortly before the action had been commenced. This new entity had not been pled into the action. Therefore, while the trial court did not believe it could determine the issues affecting title, including the application of the "one action rule", it determined that it could rule on the objection to claim issue. The "one action rule" argument, thus, is viable if raised before the state court. *Piombo Corp. v. Casterlock Properties*, 781 F.2d 159, 163 (9th Cir. 1986).

As this matter has not been properly raised on appeal, we do not look to the merits of the issue.

2. Whether the Appellees' Claim is Barred by the Doctrines of Impossibility, Impracticability and/or Frustration of Purpose.

The bankruptcy court rejected the Appellants' argument that the equitable doctrines of impossibility, impracticability and frustration of purpose excused their performances due under the promissory notes as a result of the severe downturn in the farm economy beginning about 1984. We review mixed questions of law and fact *de novo*. The Appellants, as the party asserting the equitable defenses of impossibility, impracticability and frustration of purpose, bear the burden of proving the necessary facts to support the doctrines. *Lawrence v. Elmore Bean Warehouse, Inc.*, 108 Idaho 892, 894 (Idaho Ct. App. 1985).

A. Impossibility and Impracticability.

The required elements for the doctrine of impossibility in Idaho are:

> (1) contingency must occur; (2) performance must be impossible, not just more difficult or more expensive; and (3) the non-occurrence of the contingency must be a basic assumption of the agreement.

Haessly v. Safeco Title Ins. Co. of Idaho, 212 Idaho 463, 465 (1992). "A sine qua non for application of the doctrine is that the parties must have contracted, expressly or in necessary contemplation, with reference to continued existence of the specific thing as a condition essential to performance." *Twin Harbors Lumber Co. v. Carrico*, 92 Idaho 343, 349 (1968). A mere change in the degree of difficulty or expense due to such causes as increased wages, prices or costs do not amount to impracticability.

RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. d (1981). The continuation of existing market conditions and of financial situation of one of the parties are ordinarily not basic assumptions, so that mere market shifts or financial inability do not usually amount to impracticability. RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. b (1981).

For the Appellants to prevail, they must prove that the non-occurrence of the contingency, in this case the severe down turn in the farm economy, was a basic assumption underlying the contract. First, the Appellants must prove that performance became impossible, not merely more difficult. Second, it is insufficient to merely claim that there was a severe down turn in the farm economy. The Appellants must prove that both they and the Appellees entered into the promissory notes relying on the continued prosperity in the farm economy.

The Appellants have failed to prove the elements required for impossibility. Most of the evidence considered by the trial court, including the testimony of Dr. Gilbert Miller, the Appellants' main expert witness, goes to prove that a depression in the farm economy existed during the 1980s. There is no evidence that the parties expressly contracted or contemplated the continuation of a strong farm economy as a contingency for payment. The trial court discounted the reliability of Dr. Miller's testimony because he did not have personal knowledge of any of the particular facts and circumstances of this case. Dr. Miller testified that he had never reviewed the books, records or other evidence of the Appellants' John Deere dealership's operations. The trial court's factual analysis was not clearly erroneous.

The case of *Twin Harbors* provides an interesting analogy. In *Twin Harbors*, the parties expressly agreed in a written contract that the promissory note was to be paid out of the proceeds derived from the sale of timber on the property being sold. Subsequently, the exclusive buyer of the timber, who also happened to be the mortgagee on the property, went out of business. The mortgagor raised the defenses of impossibility and frustration of purpose to excuse its performance under the contract. The Supreme Court of Idaho, however, found that the provision in the contract cited above was merely an alternative method of payment. *Twin Harbors*, 92 Idaho at 349. The court concluded that the parties intended to pay off the mortgage in money or money's worth. *Id.*

Here, the Appellants and the Appellees never expressly agreed in a written contract that the income generated by the John Deere dealership would be sufficient to pay off the promissory notes. We look to the reasoning behind the *Twin Harbors* decision and find that the Appellees intended to be paid in money or money's worth. The income generated by the dealership was merely an alternative source of payment. Once the farm economy went sour around 1984, the Appellants' performance became more difficult but not impossible. In fact, other farm implement dealers, including those who Appellants called as their witnesses, did quite well during the 1980s.

Secondly, the Appellants have failed to prove that the continued vitality of the farm economy was a basic assumption between the parties at the time of the agreement. As the lower court found, farm economy is by its very nature unpredictable. It is highly unlikely that the Appellees would enter into two long-term promissory notes

for over $2 million with the assumption that they would be paid only when the Appellants felt the economy merited paying on the notes. There was never a written agreement or warranty in the numerous promissory notes, personal guarantees and subsequent modifications making the performances due by the Appellants contingent upon the level of business of the John Deere dealership. In the absence of such written contractual agreement, we find that the basic assumption underlying the promissory notes did not include the continued vitality of the farm economy.

We note by analogy a Sixth Circuit case in which a farm equipment dealer cited the dramatic market shift in the farm economy during the 1980s as an excuse to unilaterally terminate its dealership agreement, citing impossibility, impracticability and frustration of purpose. *Karl Wendt Farm Equip Co., Inc. v. International Harvester Co.*, 931 F.2d 1112 (6th Cir. 1991). The Sixth Circuit found, relying on Restatement (Second) of Contracts, that neither market shifts nor the financial inability of the financially strapped dealer changes the basic assumption of the contract such that it may be excused under the doctrines of impossibility, impracticability and frustration of purpose. *Id.* at 1117-18. As the lower court stated, to hold otherwise would excuse all contract performances entered into during the 1980s in Idaho.

The doctrine of impossibility also requires that the contingency which excuses the performance must be "unforeseen" and caused by a third party. *Haessly*, 121 Idaho at 465; *see also Connecticut Nat'l Bank v. Trans World Airlines*, 762 F. Supp. 76 (S.D.N.Y. 1991) (stating that events such as increases in oil price and the ever imminent threat of war in the Middle East are insufficient to raise the defense of impossibility because they are

foreseeable). As stated above, fluctuation in the farm economy is not only foreseeable but is to be expected. The trial court also found sufficient evidence of mismanagement and undercapitalization which may have led to the decline in the performance of the John Deere dealership. For example, the dealership operated for many years during the 1980s without a manager with the experience level required by John Deere. The trial court's findings of fact in this regard are not clearly erroneous.

We distinguish this case from cases dealing with true impossibility defenses to contracts. A good example of a valid impossibility defense is reported in *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 591 F. Supp. 293 (E.D. Mo. 1984), *aff'g* 758 F.2d 341 (8th Cir. 1985), *cert. dismissed*, 474 U.S. 948 (1985). In that case, McDonnell Douglas Corporation ("McDonnell Douglas") entered into a contract with the Imperial Iranian Air Force for the sale of spare parts for F-4 fighter aircraft in 1975. Following the fall of the Shah of Iran in 1980, McDonnell Douglas was unable to perform its duties under the contract because shippers refused to transport goods to Iran, the United States Government prohibited selling any military equipment to Iran, and the Imperial Iranian Air Force no longer existed.

When the Islamic Republic of Iran sued for breach of contract, the court concluded that it was physically and legally impossible for McDonnell Douglas to perform. Basic assumptions underlying any contract, like the continuing existence of the other party to the contract and the availability of shippers, no longer existed, excusing McDonnell Douglas' performance. *Id.* at 298-99.

The fact pattern in this case does not rise to the level of impossibility as described in *McDonnell Douglas*. To allow the impossibility defense to go forward in this case would mean any party to a contract could get out if the economy weakens. As did the trial court, we find the Appellants' argument unpersuasive.

B. Frustration of Purpose.

The doctrine of frustration of purpose is much narrower than impossibility and requires the following:

> The frustration principle operates in a proper situation to excuse a promisor's duty of performance if some supervening event has destroyed the value of the counter-performance bargained for by the promisor, even though the counter-performance is still literally possible.

Twin Harbors, 92 Idaho at 348 (although this case specifically deals with a supervening event, the doctrine of frustration of purpose may apply to events that arose before the contract). The classic example of the frustration doctrine is *Krell v. Henry*, 2 K.B. 740 (1903), where a promisor's duty to pay 75 pounds rent for a balcony to view the King's coronation was excused due to the cancellation of the procession. Although the counter-performance, the renting of the balcony, was literally possible, the cancellation of the procession destroyed the value or the purpose behind the transaction.

The situation between the Appellants and the Appellees does not fall under the doctrine of frustration of purpose. The value of the counter-performance bargained for by the Appellants has not been destroyed. In fact, the Appellees completed their performance due under the

promissory notes when they transferred their interests in the dealership and the real property to the Appellants and other buyers. Having received and enjoyed the counter-performance they bargained for, the Appellants cannot now seek to excuse their performance under the doctrine of frustration of purpose.

We find that the doctrines of impossibility, impracticability and frustration of purpose do not bar the Appellees' claims against the Appellants. The trial court's order overruling the Appellees' objections to claim is affirmed.

3. Whether the Tax Obligation Owed to the IRS is a Non-Farm Obligation.

On appeal, the Appellants assert that the trial court erred by concluding that the tax obligation owed to the IRS for the tax year 1976 did not arise from a farm operation. This is an issue of law, which the Panel reviews *de novo*. In a Chapter 12 case the debtors, the Appellants in this case, have the burden of establishing that their plan complies with the statutory requirements of confirmation. *In re Buckingham*, 197 B.R. 97, 102-03 (Bankr. D. Mont. 1996).

We note that, as a result of our determination of the objection to claim, this issue will not affect our decision to affirm. We address the tax issue only to the extent that it acted as an alternative basis to dismiss the Appellants' Chapter 12 cases because they failed to meet the 80 percent threshold for debts arising out of farm operations. 11 U.S.C. § 101(18)(B)(ii).

The Appellants' position is that the only evidence regarding the nature of the IRS debt was the testimony of

Darwin Neibaur. As a result, the Appellants believe the trial court was bound to accept the testimony. We disagree. A trial court is free to reject testimony it finds untrustworthy. *Plummer v. Western Intern. Hotels Co., Inc.*, 656 F.2d 502, 505 (9th Cir. 1981). As set forth below, Darwin Neibaur's testimony regarding the nature of the IRS debt is so brief, unsupported and conclusory that we will not disturb the lower court's determination that the testimony did not sustain the Appellant's burden of proof at trial.

11 U.S.C. § 101(21) defines a farm operation as:

> farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock, and production of poultry or livestock in an unmanufactured state.

11 U.S.C. § 101(21) (1994). Although the list is non-exclusive, courts have narrowly construed the definition of what constitutes a farm operation. For example, a contract farming venture did not constitute a farming operation. *In re California Land and Equip. Leasing Co.*, 72 B.R. 1 (Bankr. E.D. Cal. 1984). Not even services related to farming, like aerial crop dusting or harvesting services, constitute a farm operation. *In re Van Air Flying Serv.*, 146 B.R. 816 (Bankr. E.D. Ark. 1992); *In re Blackwelder Harvesting Co.*, 106 B.R. 301 (Bankr. M.D. Fla. 1989).

The record on appeal as to exactly how the IRS's claim arose is sparse. Appellant Darwin Neibaur's testimony states that he tried to delay realizing income from his farm for the tax year 1976 by "straddling" on silver or gold. Although this is not much to go on, straddling in commodities definitely falls outside of the definition of 11

U.S.C. § 101(21) and related case law. Because the burden of proof was on the Appellants at the trial court, they cannot now shift the burden to the Appellees on appeal. The trial court's decision as to this issue is affirmed.

CONCLUSION

Based on the foregoing, we affirm all issues on appeal. As a corollary to affirming the issues on appeal, the trial court's orders (1) overruling the Appellants' objections to the Appellees' claim; (2) denying confirmation to the Appellants' Joint Amended Chapter 12 Plan; and (3) dismissing the Appellants' bankruptcy cases are **AFFIRMED.**

U.S. Bankruptcy Appellate Panel
of the Ninth Circuit Court of Appeals
125 South Grand Avenue
Pasadena, California 91105
(626) 583-7906

NOTICE OF ENTRY OF JUDGMENT

BAP No. ID-96-1843-RoJRy

RE: DARWIN P. NEIBAUR

A separate Judgment was entered in this case on ___ 7/24/97 ___.

BILL OF COSTS:

Bankruptcy Rule 8014 provides that costs on appeal shall be taxed by the Clerk of the Bankruptcy Court. Cost bills should be filed with the Clerk of the Bankruptcy Court from which the appeal was taken. Also see, Federal Rule of Appellate Procedure 39.

ISSUANCE OF THE MANDATE:

The mandate, a certified copy of the judgment sent to the Clerk of the Bankruptcy Court from which the appeal was taken, will be issued 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. See Federal Rule of Appellate Procedure 41.

APPEAL TO COURT OF APPEALS:

An appeal to the Ninth Circuit Court of Appeals is initiated by filing a notice of appeal with the Clerk of this Panel. The Notice of Appeal should be accompanied by payment of the $100 filing fee. Checks may be made

payable to the U.S. Court of Appeals for the Ninth Circuit. See Federal Rules of Appellate Procedure 6 and the corresponding Rules of the United States Court of Appeals for the Ninth Circuit for specific time requirements.